CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1930

ELLIE JONES v. SOUTHERN RAILWAY COMPANY AND NORTH CAROLINA RAILROAD COMPANY.

(Filed 16 June, 1930.)

1. **Negligence A c—Owner of land is required to exercise reasonable care for safety of invitee.**

A license to enter upon the lands of the owner implies permission given, and is more than mere sufferance, while an invitation implies solicitation, desire or request of the owner, and therein the rule affecting the owner's liability for injuries to an invitee while on the premises is more rigid than in the case of a trespasser or mere licensee, and the owner or occupant is required to exercise reasonable care for the safety of an invitee, although he is not an insurer.

2. **Same—Owner is liable where he knows of use of path by licensee and increases the hazard without notice to him.**

The general rule that the owner or occupant of land is not liable for a personal injury received by a licensee upon his premises caused by defects, obstructions or pitfalls upon the premises, unless the injury is caused by wilful and wanton negligence, is subject to the modification that if the owner knows of the habitual use of his land as a pathway and does some act to increase the hazard or danger without warning the licensee, causing injury without fault of the licensee, the owner or occupant of the land may be held liable as in case of ordinary negligence.

3. **Railroads C c—Where railroad company knowingly permits use of path on right of way and increases the hazard it is liable for injury.**

Where a railroad company knowingly permits the use of a pathway across its tracks by pedestrians for years without objection, and then fills in the track with dirt so as to make pitfalls where the pathway crosses the track, and a pedestrian in attempting to cross the track in the usual way stumbles in the loose dirt and falls and is injured: *Held,* the fact that such pedestrian was a licensee of the company at the time does not prevent his recovering damages resulting from the active negligence of the railroad company in increasing the hazard.

BROGDEN, J., dissenting; STACY, C. J., concurs in dissenting opinion.

APPEAL by defendants from *Lyon, J.,* at January Special Term, 1930, of WAKE. No error.

Action to recover damages for personal injury alleged to have been caused by the negligence of Southern Railway Company, lessee of its codefendant.

Plaintiff alleges that defendants' road crosses Lee Street in Raleigh; that a walkway across the track and roadbed had been used by pedestrians for many years; that the track is on a steep embankment; that the lessee put and negligently left loose dirt between the crossties and between the rails and on both sides of the track; that on 28 July, 1927, the plaintiff started across the track and put her left foot on fresh dirt between the rails; that she then stepped over the east rail and put her right foot on loose dirt between the east rail and the edge of the embankment; that her foot went down "halfway between the knee and the ankle" and struck a rock or clod; that the dirt seemed to be solid; that she was thus caused to stumble and step upon other loose dirt covering a hole about a foot deep; that in this way she was hurled down the embankment and injured; that her right leg was broken; that she suffered other injuries; and that her injuries were proximately caused by the lessee's negligent failure to keep and maintain the crossing in a reasonably safe condition.

The defendants denied the material allegations of the complaint, pleaded contributory negligence, and alleged in bar of the plaintiff's recovery that the defendants owed the plaintiff no duty with respect to the condition of the track and right of way.

The issues were answered as follows:

1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by her own negligence, contribute to her injury, as alleged in the answer? Answer: No.

3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $1,250 for personal injury, and medical expenses of $250.00.

Judgment for plaintiff; appeal by defendants for errors assigned.

C. A. Douglass, R. L. McMillan and R. Roy Carter for plaintiff.
Smith & Joyner for defendants.

ADAMS, J. The plaintiff contends that the footpath in question had been used by the public for thirty or forty years prior to her injury and that the defendants, knowing this, not only passively failed to keep the path in a reasonably safe condition, but actively increased the danger to pedestrians by filling holes therein with rock and loose dirt. She offered evidence tending to establish each of these contentions.

The defendants introduced no witnesses. But they say that the plaintiff's evidence was not sufficient in law to make a case of actionable negligence; that the defendants were under no obligation to the plaintiff to keep the pathway in repair; that the plaintiff was not an invitee but at most only a licensee; that the defendants violated no duty they owed to a permissive user; that according to her own testimony the plaintiff was negligent; and, finally, that the action should have been dismissed, upon their motion, as in case of nonsuit.

One of the chief controversies between the parties grows out of a difference of opinion between them as to whether the plaintiff had a bare license to use the crossing or whether she used it in the capacity of an implied invitee.

The defendants admit that the plaintiff was not a trespasser. If a person is not a trespasser and has no invitation express or implied to enter upon the premises of another, he is a licensee if his entry is permitted by the owner or the occupant. An invitee is one who goes upon the property of another by the express or implied invitation of the owner or the person in control. A license implies permission and is more than mere sufferance; an invitation implies solicitation, desire, or request.

The owner or occupant of property, while not an insurer, owes to an invitee the duty of exercising ordinary and reasonable care for his safety. It is otherwise with respect to a licensee. The law as a rule imposes no duty on the owner or occupant to keep his premises in a suitable condition for those who come upon it solely for their own convenience or pleasure. As stated in *Brigman v. Construction Co.*, 192 N. C., 791, the general rule is that a trespasser or permissive or bare licensee upon the property of another cannot recover for personal injury resulting from defects, obstacles, or pitfalls upon the premises unless the injury is caused by negligence which is wanton or wilful. This is the general rule. As to a licensee the duties of a property owner are substantially the same as with respect to a trespasser; but an essential difference arises out of conditions which impose upon the owner or occupant of property the duty of anticipating the presence of a licensee. 45 C. J., 796, sec. 201. This difference is recognized in *Brigman's case, supra,* and in *Money v. Hotel Co.*, 174 N. C., 508. In the latter it is said that the general rule given above requires some qualification as to persons on premises by permission, or under license express or implied, whose presence could reasonably be anticipated at or near the point of danger; and in the former case it is said: "The strict rule exempting the owner of premises from liability to a licensee is ordinarily applied when the negligence of the owner is passive. If the owner, while the licensee is upon the premises in the exercise of due care, is affirmatively and actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased hazard and danger, the owner will be liable for injuries sustained as a result of such active and affirmative negligence."

The suggested modification of the general rule was adverted to in *Monroe v. R. R.,* 151 N. C., 374. After setting forth in an excerpt from *Sweeney v. R. R.,* 10 Allen, 368, 87 Anno. Dec., 644, the usually applied principle that a licensee who enters on premises by permission only, without enticement, allurement, or inducement held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls, the Court pertinently said: "Nor does the application of this principle protect from liability the owner of a lot or a railroad company who, with knowledge of the user of his property as a pathway across or along it, places without warning to those likely to use the pathway, a new and dangerous pitfall or obstruction."

With these principles in mind we deem it needless to embark upon a discussion of other distinctions between the rights of a licensee and an invitee; for conceding, as the defendants contend, that the plaintiff was a licensee, we find in the record at least some evidence, "more than a scintilla," that the defendants, knowing the path was regularly used by pedestrians, placed upon the roadbed a quantity of loose dirt which increased the hazard of using the path, and that they neglected to give notice or warning, actual or constructive, of the changed conditions. "Where the owner or occupant of premises, with knowledge and for a long period of time, permits the public to use the premises without objection, for the purpose of traveling across the same on a well established and safe pathway or highway, he cannot, without giving notice, render the premises unsafe to the injury of those who have used such highway, and have no notice of the changed condition, without being responsible for the resulting injury." 20 R. C. L., 65, *Batts v. Tel. Co.,* 186 N. C., 120. This view of the case was left to the consideration of the jury and answered adversely to the defendants.

After due consideration of the exceptions addressed to the charge we have found no error therein pointed out which entitles the defendants to a new trial. It necessarily follows from what we have said that no error was committed in the court's refusal to dismiss the action.

No error.

BROGDEN, J., dissenting: As I interpret the record, the place where plaintiff was injured was not a public crossing. It was no more than a walkway made by plaintiff and others for their own convenience. The defendant had done nothing to invite the public to cross its tracks at that point. Consequently, plaintiff and others using the tracks for their own convenience should be required to take the premises as they found it. There was no evidence that the defendant increased the hazard by active negligence while the plaintiff was upon the track and there were no pitfalls, mantraps or dangerous excavations. The defendant had merely sanded its track at a point where plaintiff and others had made a path for their own convenience. To impose liability upon the defendant for sanding its track at a point where pedestrians have used it for their own purposes, strikes me as an unreasonable burden.

STACY, C. J., concurs in dissenting opinion.

MRS. AMANDA C. SMITH v. F. L. SUITT AND WIFE, MAMIE R. SUITT, J. I. BEASLEY AND WIFE, DAISY BEASLEY, AND MINNIE SMITH.

(Filed 16 June, 1930.)

1. **Life Estates B a—Life tenant is not entitled to recover value of permanent improvements from remaindermen.**

   One who makes permanent improvements on an estate knowing at the time that she owns only a life estate therein, may not maintain her suit against the remaindermen to recover a proportionate part of the value of the improvements upon the ground that the improvements were for the benefit of their remaindermen, and the cost of such improvements are chargeable to the life tenant alone.

2. **Life Estates C a—Life tenant may have estate sold for reinvestment on equitable grounds under C. S., 1744.**

   A tenant for life in lands may not by adversary proceedings against the remaindermen compel the sale of lands for partition of the proceeds, C. S., 3255, but upon a proper showing the sale for reinvestment may be ordered in equitable proceedings under the provisions of C. S., 1744.

3. **Pleadings D a—Where plaintiff is entitled to any relief upon the complaint demurrer thereto should be overruled.**

   Where a complaint includes a statement of a good cause of action among others that are not good a demurrer thereto is properly overruled.

BROGDEN, J., not sitting.

APPEAL by defendants from *Harris, J.*, at January Term, 1930, of DURHAM. Affirmed.

The plaintiff owns a life estate, a dower interest duly allotted to her in certain lands of her husband, John W. Smith, in the city of Durham, N. C.: (1) 408 East Main Street, and the defendants, the remainder. When her dower was laid off she was allotted the "Home Place." On the homestead was an old dwelling-house. The plaintiff alleges that this was "in very bad condition, and in order to make the house habitable and rentable the plaintiff, at various times has had to make permanent improvements on the property, and has spent, in making said permanent improvements, at least the sum of $9,566.47, and in all probability a larger amount; that this sum does not include necessary expenses for repairs and upkeep on the property, but is for permanent improvements, and as such added to the value of the property and benefited the defendants at least the amount expended. (2) No. 414 and 416 West Main Street was allotted to her and is valuable as rental property—necessary permanent improvements had to be made at a cost of $3,511.84. (3) The property known as No. 211 East Main Street was alloted to her, and during said period she has received, after paying insurance, repairs, and taxes, a net income of $9,886.61.

It is further alleged that "after said improvements were made, and prior to the institution of this action, the plaintiff notified the defendants of the amounts that she had spent by way of permanent improvements on the property and requested the defendants to pay their part of said improvements. That the defendants have refused and still refuse to pay for any portion of said permanent improvements necessary to be made on either of the said pieces of property."

"That on all of said property for said period the plaintiff has received a total income of $28,386.00 and has expended $27,570.85, or, in other words, after owning the property for approximately five years, she has paid out by way of improvements, taxes and repairs the entire income except $815.15, or a net annual return of approximately $163.05 on property conservatively worth $175,000."

The prayer of plaintiff is as follows:

"(1) For the recovery from the defendants of the sum of $13,078.31, with interest thereon from 1 April, 1929, or for such proportionate part of said sum as she will be entitled, under the law, to receive.

(2) That an order be made authorizing and directing the sale of the three parcels of land described in paragraph 3 of this complaint, and in order that said decree might be made effective, that a commissioner be appointed by the court to make said sale and report his proceedings.

(3) That the court order the net proceeds derived from the sale of said property distributed among the life tenant and the remaindermen in the manner prescribed by law for the distribution of such proceeds,

the amount of the recovery asked for in paragraph 1 of the relief to be deducted from the share due the defendants.

(4) That if, for any reason, the court cannot order a sale and division of the proceeds of the property the court appoint a commissioner who shall be authorized and directed to sell said property, and after paying to the plaintiff the amount of any judgment obtained by the plaintiff against the defendants reinvest the net proceeds derived from said sale under the direction of the court, with the income on the same to be paid to the plaintiff during her lifetime and at her death the remainder of said proceeds to be paid to the defendants.

(5) For the costs of this action, and for such other and further relief as the plaintiff may be entitled to have."

The defendants filed the following demurrer: "The defendants in the above entitled action hereby demur to the complaint and petition filed in said action for that said complaint does not state facts sufficient to constitute a cause of action for that: 1. The plaintiff has no cause of action for the recovery of money spent by her in making repairs and improvements upon property held by her as tenant for life, and held with the full knowledge of her interest in said property. 2. The plaintiff has no cause of action to enforce partition, or sale for partition, of any property held by her as tenant for life. Wherefore, the defendants pray that this action be dismissed at the cost of the plaintiff."

The judgment of the court below was as follows: "This cause coming on to be heard upon the demurrer filed by the defendants in the above-entitled action on the ground that the complaint did not show that the plaintiff had a cause of action, and having been heard, and it being hereby found as a fact that the complaint does state a cause of action: Now, therefore, it is hereby ordered, considered and adjudged that the demurrer be, and the same is hereby overruled, and the defendants are allowed thirty days from this date in which to file answer."

The defendants duly excepted, assigned error and appealed to the Supreme Court.

Victor S. Bryant and C. V. Jones for plaintiff.
Basil M. Watkins for defendant.

CLARKSON, J. The questions involved: (1) Under the facts as alleged in the complaint—Is a life tenant alone chargeable with the cost of permanent improvements on property in which she owns only a life estate and which improvements tend to enhance the value of the remainderman's estate as well as her own? We think so. (2) At the request of a life tenant will the court order a sale of property for partition and division or reinvestment? We think not in a partition proceeding. Upon proper showing a sale for reinvestment can be had in an equitable proceeding or under C. S., 1744.

As to the first question, we think the principle is well stated in 17 R. C. L., at p. 635 and 636: "It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements, nor can a charge upon the lands of the inheritance be made for such improvements, it being generally held that a life tenant does not come within the purview of the betterment or occupying claimant's acts. The reasons for this rule are that the life tenant should not be permitted to consume the interest of the remainderman by making improvements that the remainderman cannot pay for, or that he does not desire, and also that improvements are made for the immediate benefit of the life estate, and usually without reference to the wishes of the remainderman. Mere knowledge on the part of the remainderman that improvements are being made and passive acquiescence therein are not sufficient to charge him with the cost thereof. An exception has been made where the life tenant is an infant, and the income from the property is by order of the court invested in permanent improvements. Ordinarily, a third person claiming under the life tenant is entitled to no greater rights than the life tenant himself, but some courts, applying equitable principles, have allowed recovery where improvements have been made by a person who, although in fact holding under a life tenant, believed himself to be the owner of the fee." *Merritt v. Scott,* 81 N. C., 385; *Northcott v. Northcott,* 175 N. C., 148; *Pendleton v. Williams,* 175 N. C., 248; *Harriett v. Harriett,* 181 N. C., 75. The case of *Middleton v. Riggsbee,* 179 N. C., 437, we think is distinguishable and applicable to the facts in that particular case.

It is said in *Pritchard v. Williams,* 181 N. C., at p. 47: "The plaintiff's fourth and fifth exceptions were to the refusal of prayers to instruct the jury, which were based upon the idea that since under the terms of the trust established in the main cause, 175 N. C., 319, the plaintiff was decreed to be the owner of the life estate, he occupied the position of a life tenant with respect to the improvements made by him. But he was not an ordinary life tenant within the meaning of the principle that life tenants cannot recover for betterments which were placed thereon with knowledge of the fact. The defendant made the improvements, as the jury find, under a bona fide belief that he was the owner in fee simple, and the Court decided that the plaintiff was entitled to have the issue thereon submitted, 176 N. C., 108, by a unanimous Court, and this was reaffirmed on rehearing, 178 N. C., 444. The plaintiff's prayers were therefore properly refused." The plaintiff in the present action made the permanent improvements by her own will and accord, and knew she had only a life estate.

In the instant case, the life tenant does not join with the remaindermen in a petition for the sale of the property for partition, and neither is she made a party defendant in an action instituted by the remaindermen, but, on the other hand, the plaintiff has sought in an adversary proceeding against the remaindermen to have a sale of the property ordered in order that same may be partitioned. This cannot be done. C. S., 3235. *Ray v. Poole,* 187 N. C., 749; *Gillespie v. Allison,* 115 N. C., 542 *(S. c.,* 117 N. C., 512).

Under C. S., 1744, the life tenant can maintain this action for reinvestment and sell the lands described in the complaint upon proper showing, and this can be done in an equitable proceeding. On this aspect see *Middleton v. Riggsbee, supra; Pendleton v. Williams, supra.* The complaint is not demurrable unless it is wholly insufficient. If a demurrer is interposed to a whole complaint and any one of the causes of action is good the demurrer will be overruled.

The judgment below overruling the demurrer is therefore
Affirmed.

BROGDEN, J., not sitting.

STATE v. JOHN RATCLIFF.

(Filed 16 June, 1930.)

Burglary C f—In this case held: instruction that jury might convict defendant of first degree burglary or acquit him was error.

Where in a prosecution for burglary all the evidence tends to show occupancy of the house at the time of the breaking and entering, an instruction that the jury might convict the defendant of burglary in the second degree would be erroneous, although a verdict of guilty of burglary in the second degree would stand, but where the evidence would sustain a verdict of burglary in the first degree, or of breaking and entering otherwise than burglariously with intent to commit rape or other infamous crime, or of an attempt to commit either offense, or not guilty, the defendant is entitled to have the different views arising upon the evidence presented to the jury, and an instruction that the jury might convict the defendant of burglary in the first degree or acquit him is error which is not cured by a verdict of guilty of burglary in the first degree, and a new trial will be awarded. C. S., 4640.

APPEAL by defendant from *Clement, J.,* at September Term, 1929, of ANSON.

Criminal prosecution tried upon an indictment in which it is charged that the prisoner did, about the hour of 12 o'clock on the night of 22 September, 1929, with force and arms, at and in the county of

Anson, wilfully, feloniously and burglariously break and enter the dwelling-house of one B. F. Gulledge, then and there actually occupied by the said B. F. Gulledge, "with the intent to commit the crime of rape and other infamous crimes therein, against the form of the statute in such cases made and provided and against the peace and dignity of the State."

The evidence on behalf of the State tends to show that about the hour of midnight, 22 September, 1929, some one entered the sleeping apartment of Miss Emma Gulledge, in the home of her father, B. F. Gulledge, by opening a closed but unfastened door—it may have been swollen from dampness and not entirely closed—touched her on the shoulder, awaking her out of a sleep, and ran out of the house as she screamed for her father and mother, who were sleeping in an adjoining room. A comparison of the footprints, found in connection with the crime that night and the next morning, with the footprints of the accused, together with a number of other circumstances, tended to identify the prisoner as the perpetrator of the crime. *S. v. McLeod,* 198 N. C., 649.

The defendant's evidence was to the effect that he was a family servant, and had been for eleven years, of S. M. Gulledge, brother of B. F. Gulledge, who lived on an adjoining farm; that he had worked in and around both places and had known and seen Miss Emma Gulledge from the time she was a small girl; that he would be more disposed to protect her than to harm her; and that if the tracks found about the house were his, they were made the day before while he was at work and not during the night. They were too cold to be scented by bloodhounds. His further evidence tended to establish an alibi or to show that he was asleep in his quarters on S. M. Gulledge's place.

The closing instruction to the jury, which is the subject of one of the defendant's exceptions, was as follows:

"Now gentlemen, you are to find what the facts are from this evidence. If the State has satisfied you beyond a reasonable doubt that this defendant is guilty of breaking into this house in the night time, that it was used as a sleeping apartment there and then when he broke in there he intended to commit the crime of rape, and the State has satisfied you beyond a reasonable doubt of these facts it would be your duty to convict, but if the State has not satisfied you beyond a reasonable doubt that he was the one that entered the house, if you find any one entered it, it would be your duty to acquit him."

Verdict: "Guilty as charged in the bill of indictment."

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Banks D. Thomas for defendant.

STACY, C. J., after stating the case: In considering a case of burglary, attention should first be given to the form of the bill of indictment, which may be drawn in one of three ways: First, by charging the breaking and entry to be with intent to commit a designated felony; second, by charging the breaking and entry, and a designated felony actually committed; and, third, by charging the breaking and entry, with intent to commit a designated felony, and also charging the actual commission of said designated felony. *S. v. Allen,* 186 N. C., 302, 119 S. E., 504.

The form of the present bill follows the first method above mentioned, and under it the prisoner may be convicted of burglary in the first degree, or of burglary in the second degree, depending on whether or not the dwelling-house was actually occupied at the time, or of an attempt to commit either of said offenses, or he may be convicted of breaking or entering the dwelling-house in question, other than burglariously, contrary to the provisions of C. S., 4235, or of an attempt to commit said offense, or he may be acquitted. *S. v. Fleming,* 107 N. C., 905, 12 S. E., 131; *S. v. Spear,* 164 N. C., 452, 79 S. E., 869. It is provided by C. S., 4640, that upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. *S. v. Brown,* 113 N. C., 645, 18 S. E., 51.

There is no evidence on the present record of burglary in the second degree as defined by C. S., 4232, unless the jury disbelieve the evidence relating to occupancy. *S. v. Alston,* 113 N. C., 666, 18 S. E., 692. All the evidence tends to show that the dwelling-house was actually occupied at the time of the alleged offense. Hence, under these conditions, according to our previous decisions, an instruction that the jury may render a verdict of burglary in the second degree, "if they deem it proper to do so" (C. S., 4641), would be erroneous, though a verdict of burglary in the second degree, if returned by the jury, would be permitted to stand, such a verdict, under the circumstances, being regarded as favorable to the prisoner. *S. v. Fleming, supra; S. v. Alston, supra.* This may seem somewhat illogical, in view of C. S., 4640 and 4641, nevertheless it is firmly established by a number of decisions, and the prisoner is not now challenging the correctness of these decisions.

But where it is permissible under the indictment to convict the defendant of a less degree of the same crime, or of an attempt, as illustrated by numerous decisions, and there is evidence tending to support a milder verdict, the prisoner is entitled to have the different views, arising on the evidence, presented to the jury under a proper charge, and an error in this respect is not cured by a verdict convicting the defendant of the highest offense charged in the bill of indictment, for, in such case, it cannot be known whether the jury would have rendered a milder verdict, if the different views, arising on the evidence, had been correctly presented. *S. v. Newsome,* 195 N. C., 552, at page 566, 143 S. E., 187.

It was error, therefore, in the instant case to limit the jury to one of two verdicts—burglary in the first degree or not guilty. Rather it would seem that one of five verdicts, depending, of course, on the facts as established by the evidence, should have been submitted as the correct latitude: (1) Guilty of burglary in the first degree; (2) guilty of an attempt to commit burglary in the first degree; (3) guilty of breaking or entering the house in question, other than burglariously, with intent to commit rape or other infamous crime therein; (4) guilty of an attempt to break or enter the house in question, other than burglariously, with intent to commit rape or other infamous crime therein; or (5) not guilty. *S. v. Allen, supra; S. v. Spear, supra.*

Again, it may be doubted as to whether the verdict, "guilty as charged in the bill of indictment," where, under the indictment and evidence, as here, one of several verdicts may be rendered, is sufficient to support a judgment. *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. Barbee,* 197 N. C., 248, 148 S. E., 249. But we need not determine this question, as a new trial must be awarded on other grounds.

New trial.

MILDRED T. WEST v. MARTIN H. WEST.

(Filed 16 June, 1930.)

1. **Contempt A b—Violation of order to pay money for support of son must be wilfull to constitute contempt.**

   It is required by the express terms of the statute that in order to punish one as in contempt of court, C. S., 978, subsection 4, that he should have wilfully disobeyed a process or order lawfully issued by a court, and where the husband, in proceedings against him for contempt for disobeying an order to pay moneys for the support of his child, shows by the uncontradicted testimony of himself and witness that he had no property nor income except what he could earn, and that he had been unable to obtain employment and was therefore unable to comply with the terms of the order, the evidence fails to show that the disobedience was wilful, and he may not be adjudged in contempt of court and a sentence imposed upon him.

2. Contempt A a—Statute defining contempt should be strictly construed.

C. S., 978, defining contempt of court for which a defendant may be punished should be strictly construed as a criminal statute.

3. Contempt B b—Court should find fact concerning purpose of contemnor sufficient to support his judgment.

Upon imposing a sentence for contempt of court the judge should find the fact concerning the purpose and object of the contemnor sufficient to support his judgment.

APPEAL by defendant, Martin H. West, from *MacRae, Special Judge,* 20 February, 1930. From BUNCOMBE. Reversed.

The plaintiff and defendant were married on 22 May, 1920, and lived together as man and wife until 8 July, 1928. They had one son, Martin H. West, Jr., born 17 May, 1921. The plaintiff obtained a divorce absolute against the defendant, and he has married again.

A judgment was rendered by Finley, J., to which the defendant made no exception, as follows: It is "ordered, adjudged and decreed by the court that the defendant pay to the plaintiff for the maintenance and support of said minor, Martin H. West, Jr., the sum of $25 per month, the first payment to be made on 15 December, 1929, and $25 to be paid on the 15th of each month thereafter, said payments to be made to the clerk of the Superior Court for Buncombe County, North Carolina."

The plaintiff made an affidavit in the cause and, among other things, is the following: "That, this affiant has complied with the provisions of the judgment on her part in all respects, but that the defendant, Martin H. West, has failed and refused, and continues to fail and refuse to pay any sum whatever for the maintenance of Martin H. West, Jr., and has not to this date paid one cent for such support. Wherefore, affiant prays the court that notice issue to Martin H. West to show cause at a time and place, to be fixed by the court, if any he has, why he should not be attached for contempt of court."

The cause came on for hearing before Judge C. F. MacRae, judge presiding. The plaintiff introduced no evidence. The defendant testified, in part: "There was born to us one son, Martin H. West, Jr., on 17 May, 1921; he is at the present time living on Arlington Street, with Mildred West, but spends every other week with me. I have tried to locate a position or a job for the past eighteen months, without success; I have tried many places for work, but have not been able to find any with the exception of approximately six weeks that I worked at the sheriff's office. I have written to foreign corporations in order to get a position as a salesman, and I have been to many local places in Asheville; I have not been able to comply with Judge Finley's order to pay $25 a month toward the support of my son, Martin H. West, Jr.; the reason that I have not been able to pay it is because I have not had work; I do not own any property, and have no income whatever."

On cross-examination he stated that his wife obtained an absolute divorce; that he married again on 30 November, 1929, and is living with his wife, who is a nurse and she works when she can get employment, but at present the demand for nursing is quiet and she is getting very little to do. He is 29 years of age and in good health and suffering from no physical disability. At May Term, 1922, of the Superior Court of Buncombe County he was ordered to pay $40 a month for the support of his wife and child; that he was cited for failure to comply with the former judgment. He further testified: "I don't see why I should have been required to support my wife prior to the divorce, since she left me and took the child with her. I have paid nothing since Judge Finley's order."

S. D. West, the father of defendant, testified: "Martin H. West is my son; he lives with me at 157 Patton Avenue; he has lived with me there for a number of years, with the exception of the time he and his wife lived together; he is not employed at this time; he has tried many places to my knowledge to get employment; he does not own any property and has no income. I don't think he has worked at a regular position, with the exception of the time that he was at the sheriff's office for about six weeks, for the past eighteen months. I am out of employment at this time. I have been for the last sixteen years employed at the weight department of the Southern Railway, but, due to lack of work and poor business, I have been cut off. I have no other income but my salary. I do not own any property, and have no way to help him, and cannot give him the money to pay to his son. I am willing to take the boy, take care of him, and provide support for him, send him to school, and provide a home for him until Martin is able to get a position; that is all I can do."

The judgment of the court below, in part, is as follows: "Upon hearing the evidence the court finds as a fact that the defendant, Martin H. West, has contemptuously failed and refused to comply with the order of the court in that, he has failed to pay the amount adjudged for him to pay as above set out, or any part thereof; that he has shown to the court no lawful reason or excuse why he could not or did not pay said amounts. It is, therefore, ordered and adjudged by the court that the defendant, Martin H. West, has contemptuously violated the judgments of this court and is, therefore, in contempt of court; and it is further ordered that he be confined in the common jail of Buncombe County, and to remain there until he complies with the judgment of the court or is otherwise discharged by law. This, 20 February, 1930. C. F. MacRae, judge presiding."

Defendant excepted to the judgment of the court below, assigned error and appealed to the Supreme Court.

J. Y. Jordan, Jr., and G. Lyle Jones for plaintiff.
W. A. Sullivan for defendant.

CLARKSON, J. The question involved: Should the order adjudging defendant in contempt of court have been signed over the objection of defendant from the record as appears in the case? We think not.

Chapter 17, Consolidated Statutes, under "Contempt," the pertinent provision to the present controversy, is C. S., 978: "Any person guilty of any of the following acts may be punished for contempt: (4) Wilful disobedience of any process or order lawfully issued by any court." It will be noted that to punish for contempt in a matter of this kind, there must be *wilful disobedience.* We think the decision hinges on the meaning of *wilful disobedience.*

In *S. v. Whitener,* 93 N. C., at p. 592, speaking to the subject: "The word wilful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute."

In *S. v. Banks,* 143 N. C., 657, we find: "The word 'wilful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law." In *S. v. Faulkner,* 182 N. C., p. 798, it is said: "The term *unlawfully* implies that an act is done, or not done, as the law allows, or requires; while the term *wilfully* implies that the act is done knowingly and of stubborn purpose."

In *Truelove v. Parker,* 191 N. C., at p. 438, it is written: "By the terms of the statute it is necessary that such abandonment be wilful—that is, accomplished purposely and deliberately in violation of law." *S. v. Morgan,* 136 N. C., 630; *Brittain v. R. R.,* 167 N. C., 642.

The evidence we doubt sufficient to show that defendant's noncompliance with the rule was wilful, as that word has been frequently defined by the decisions of this Court. As a contemnor is liable to be imprisoned the rule that a criminal statute should be strictly construed is applicable.

In re Odum, 133 N. C., at p. 251-2, it is said: "The facts should have been found and filed in the proceedings, especially that fact concerning the purpose and object of the contemnor, and the judgment should have been founded on those findings." We do not think the court below found facts sufficient to base the judgment on. For the reasons given, the judgment is

Reversed.

CLARA L. YONGE v. NEW YORK LIFE INSURANCE COMPANY ET AL.

(Filed 16 June, 1930.)

Pleadings D b: Parties B a—In this case held: personal representative of husband was necessary party and demurrer should have been sustained.

Where a company contracts to make a loan to a husband and wife to be secured by a mortgage on lands held by them by the entireties, and the husband dies pending the making of the loan, and the wife alone brings action to recover damages for breach of the contract by the loaning company: *Held*, the personal representative of the husband is a necessary party to the action and the defendant's demurrer should have been sustained.

ADAMS, CONNOR, and BROGDEN, JJ., concurring in result.

APPEAL by defendants from *Finley, J.*, 5 November, 1929. From BUNCOMBE. Reversed.

The material allegations of the complaint are to the effect: That the plaintiff and her husband, Karyll Yonge, through the Bankers Trust and Title Insurance Company, agent of the New York Life Insurance Company, agreed to borrow from the New York Life Insurance Company $12,500, on a certain lot in Lake View Park, in Buncombe County, N. C., which they held by the entireties. A note dated 17 June, 1929, for $12,500 was executed by the plaintiff, Clara L. Yonge, and her husband, Karyll Yonge, secured by a deed in trust on the above lot, to the Central Bank and Trust Company, trustee, for the New York Life Insurance Company. The deed in trust was duly recorded in Buncombe County on 12 July, 1929, and the amount of the loan was agreed to be paid to herself and husband within the next two days. The said note and deed of trust were properly executed, acknowledged, delivered and recorded, and the contract fully consummated. That her husband died on 20 July, 1929. That the money has never been paid according to contract. "That both of which corporate defendants formally accepted said application and committed themselves to a loan of $12,500 on said property, and so notified this plaintiff; that, in consequence thereof, the said plaintiff, acting in conjunction with her husband, made certain commitments and arrangements for the expenditure of the said $12,500, all of which will be fully detailed upon the trial of this cause. . . . That she is unable at this time to specify her damages and losses in detail, but will produce proof thereof at the trial of this cause; that she estimates her damages referred to in this article of her complaint at $5,000, and hereby alleges and avers that she has been damaged to that extent, by reason of the matters and things set forth herein."

The defendants demurred: "That said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them, in that, it appears from the face of the complaint that the plaintiff is not entitled to any of the relief demanded therein."

The other allegations of the complaint we think unnecessary to set forth from the view we take of the action. The court below overruled the demurrer. The defendants excepted, assigned error and appealed to the Supreme Court.

Joseph W. Little for plaintiff.
S. G. Bernard and Alfred S. Bernard for defendant.

CLARKSON, J. The action is for breach of contract, but it appears from the record that the agreement was made with plaintiff and her husband, Karyll Yonge. The death of the husband does not revoke the contract nor do the rights under the contract survive to the plaintiff. See *Burch v. Bush,* 181 N. C., 125. The record discloses that Clara L. Yonge and her husband, Karyll Yonge, both executed the note which was secured by deed of trust on a lot which they held by the entireties. The loan contract made by defendant was to both husband and wife and the breach concerns both. The husband is dead and the land goes to plaintiff as survivor, the husband and wife having an estate by the entireties, the loan made to both. The personal representative of Karyll Yonge is a necessary party.

"If it appears upon the complaint that there is a defect of parties plaintiff or defendant, objection is taken by demurrer, and for such defect not so appearing objection is taken by answer." McIntosh N. C. Prac. & Proc., 451; *Silver Valley Mining Co. v. Baltimore Smelting Co.,* 99 N. C., 445; *Kornegay v. Farmers', etc., Steamboat Co.,* 107 N. C., 115, 117; *Styers v. Alspaugh,* 118 N. C., 631; *Lanier v. Pullman Co.,* 180 N. C., 406.

In *Monger v. Lutterloh,* 195 N. C., at p. 279, citing numerous authorities, it is said: "The rule is too firmly embedded in our jurisprudence to need repeating, that ordinarily the amount of loss which a party to a contract would naturally and probably suffer from its nonperformance, and which was reasonably within the minds of the parties at the time of its making, including such special damages as may be said to arise directly from circumstances existent to the knowledge of the parties, and with reference to which the contract was made, is the measure of damages for the breach of said contract. *Causey v. Davis,* 185 N. C., 155, 116 S. E., 401. Such was the rule laid down in the celebrated case of *Hadley v. Baxendale,* 9 Exch., 341, and this case has been consistently followed by us."

We think that the allegations of damage, to comply with the above rule is incorrect, but plaintiff can move to amend, which is addressed to the discretion of the court. Ordinarily, when the pleading is sufficient but not definite and certain, motion can be made to make the allegations made definite and certain. C. S., 537. The court has a right *ex mero motu* to direct that the pleadings shall be more explicit. *Buie v. Brown,* 104 N. C., 335; *Martin v. Goode,* 111 N. C., 288; *Allen v. R. R.,* 120 N. C., 548; *Barbee v. Davis,* 187 N. C., 78; *Power Co. v. Elizabeth City,* 188 N. C., 278.

For the reasons given, the demurrer should have been sustained by the court below.

Reversed.

ADAMS, CONNOR, and BROGDEN, JJ., concurring in result.

MRS. KATE TEASLEY AND H. M. TEASLEY v. H. W. BURWELL AND MRS. H. W. BURWELL.

(Filed 16 June, 1930.)

1. **Highways B i—Testimony of cautions given the driver by guest injured in accident held competent on question of negligence.**

   In an action to recover damages for personal injuries sustained by the plaintiff while riding in an automobile as a guest of the defendant, caused by the alleged negligent driving of the defendant, testimony that the plaintiff had cautioned the defendant about her manner of driving immediately preceding the accident is competent as evidence with other evidence tending to establish the fact of negligence.

2. **Trial E c—Instruction in this case held sufficiently full.**

   Where the law arising from the evidence introduced upon the trial of an action is simple in its application and not disputed, the trial judge in his instructions to the jury does not commit reversible error in failing to go into great elaboration of detail when the jury must have understood the application of the law to the evidence and the issues. C. S., 564.

APPEAL by defendant, Mrs. H. W. Burwell, from *Shaw, J.,* at October Term, 1929, of MECKLENBURG. No error.

Actions by the plaintiffs to recover of the defendants damages resulting to each of them from personal injuries sustained by the plaintiff, Mrs. Kate Teasley, wife of the plaintiff, H. M. Teasley, and caused, as alleged in the complaints therein, by the negligence of the defendant, Mrs. H. W. Burwell, while driving an automobile owned by her husband, the defendant, H. W. Burwell, were by consent consolidated for trial of the issues raised by the pleadings.

The issues submitted to the jury were answered as follows:

"1. Were the plaintiffs injured by the negligence of the defendants, or of either of them, and if so, which one, as alleged in the complaint? Answer: Yes, Mrs. Burwell.

2. What damages, if any, is the plaintiff, Mrs. Kate Teasley, entitled to recover? Answer: $2,200.

3. What damages, if any, is the plaintiff, H. M. Teasley, entitled to recover? Answer: $150.

From judgment in accordance with the verdict, the defendant, Mrs. H. W. Burwell, appealed to the Supreme Court.

John M. Robinson and Hunter M. Jones for plaintiffs.
J. Laurence Jones for defendants.

CONNOR, J. On 15 December, 1928, the plaintiff, Mrs. Kate Teasley, was injured when the automobile in which she was riding on a public road in Mecklenburg County, near the city of Charlotte, struck the guard rail of a bridge, across the road, at the foot of a hill, and turned over. The automobile was owned by the defendant, H. W. Burwell, who, however, was not in the automobile at the time plaintiff was injured; it was driven by his wife, the defendant, Mrs. H. W. Burwell. Mrs. Teasley was the guest of Mrs. Burwell. The jury found that Mrs. Burwell was not driving the automobile at the time the plaintiff was injured as the agent of her husband, the owner, and that therefore he is not liable to the plaintiffs for the damages which resulted to each of them from the injuries sustained by Mrs. Teasley.

There is no contention on this appeal that the evidence offered by the plaintiffs at the trial was not sufficient to sustain the allegations in the complaint that each of the plaintiffs was injured by the negligence of Mrs. Burwell while driving the automobile in which Mrs. Teasley was riding as her guest, and that both the plaintiffs suffered damages as the result of her injuries.

The contention that there was error in the admission of evidence tending to show that Mrs. Burwell was cautioned by each of the plaintiffs as to the manner in which she was driving the automobile, a short time before it struck the bridge and turned over, thus causing the injuries to Mrs. Teasley, cannot be sustained. This evidence was competent as tending to show that Mrs. Burwell was driving the automobile negligently, not only at the time the caution was given, but also at the time plaintiff was injured. Only a few moments intervened between the time Mrs. Burwell was cautioned as to the manner in which she was driving and the accident. In *Harbison v. Barwinskey* (Conn.), 124 Atl., 223, it is said: "Any direction or suggestion made to the driver of the car concerning his conduct in the operation of the car was a circumstance to be considered in weighing that conduct. What he did, and what he was warned or asked not to do, and what caution was given him, were all relevant and material upon the issue of his negligence." Upon the facts shown by the evidence, there was no error in the admission of this evidence.

There is no contention by appellant that there was error in the instructions as given by the court in its charge to the jury. Her contentions that the court failed to instruct the jury that the negligence of Mrs. Burwell in driving the automobile in violation of certain statutes, was not actionable unless such negligence was the proximate cause of the injuries sustained by the plaintiffs, and also failed to instruct the jury with respect to the law applicable to the issues involving the damages which the plaintiffs were entitled to recover, if the jury should answer the first issue "Yes," cannot be sustained. An examination of the entire charge shows a substantial compliance by the judge with the requirements of C. S., 564. When the facts involved in the issues are few and simple, and the principles of law applicable to these facts are well settled, and not controverted, as in the instant case, the statute does not require that the judge shall give elaborate instructions to the jury. He is required only to "state in a plain and correct manner the evidence given in the case, and explain the law arising thereon." Under the practice in this State, the charge is given after counsel for the parties to the action have argued to the jury the whole case, as well of law as of fact. C. S., 203. When there is no controversy between counsel as to the law involved in the issues, and they so state to the jury, as was doubtless done in this case, it is needless for the judge to go beyond the requirements of the statute in his charge to the jury. Elaborate instructions as to the law applicable to the facts which the jury may find from the evidence, often confuse rather than aid the jury. The criticism of the charge of the learned and experienced judge who presided at the trial of the issues which were determinative of the rights of the parties to this action is not, we think, well grounded. The judgment is affirmed.

No error.

PEARCE-YOUNG-ANGEL COMPANY v. S. STERNBERG ET AL.

(Filed 16 June, 1930.)

1. **Laborers' and Materialmen's Liens C b—Where owner has paid contractor in full before notice of materialman's claim the owner is not liable.**

   A material furnisher for a building may not acquire a lien against the property or hold the owner liable when the owner has paid the contractor in full before receiving notice of the claim from the materialman.

2. **Appeal and Error E b—Surety's liability on bond of contractor not presented in this case.**

   The liability of a surety or indemnitor is not presented on appeal when judgment in the lower court is not sought against him, and the question is not there presented by the pleadings or evidence.

APPEAL by defendant, S. Sternberg & Co., from *Johnson, Special Judge,* at November Special Term, 1929, of BUNCOMBE.

Civil action instituted by plaintiff, owner, against J. H. Fisher, contractor, and certain materialmen, to have the balance of the contract price, $433.09, which plaintiff has paid into court, distributed among the rightful claimants, to remove the liens filed against plaintiff's property as clouds upon its title, and to have the plaintiff discharged from all liability, personal or other, to the defendants, or any of them, on account of the erection and materials furnished and used in the construction of a warehouse in the city of Asheville.

A reference was ordered (presumably by consent) and the matter heard by F. W. Thomas, Esq., who found the facts and reported the same, together with his conclusions of law, to the court. On exceptions duly filed to the report of the referee, the same was modified and affirmed, the court finding "that the last payment made by owner, Pearce-Young-Angel Co., to J. H. Fisher, contractor, was made 4 December, 1926, and before the said claim of S. Sternberg & Co. was filed with said owner," and adjudged that said claimant was neither entitled to a lien against plaintiff's property, nor "entitled to recover of any of the parties hereto," from which judgment the said S. Sternberg & Co. appeals, assigning errors.

Carter & Carter for plaintiff.

Clinton K. Hughes and Vonno L. Gudger for Carolina Bonding and Insurance Company.

Bernard, Williams & Wright for S. Sternberg & Co.

STACY, C. J. In the face of the finding that appellant's claim was not filed with the owner until after the last payment had been made to the contractor, which is not challenged by any exception (and which means in the light of the record that the surety or indemnitor completed the building at the instance of the owner and not for and on behalf of the contractor), we fail to see any error in the judgment, as it affects the rights of the owner and said claimant, of which the latter can complain. The liability of the owner for appellant's claim is the only question presented by the appeal.

When the owner has paid the contractor in full, prior to receipt of notice of claim from a laborer or materialman for work done on or material furnished and used in the construction of a building, there is no provision in the statute whereby such laborer or materialman may acquire a lien against the property, or hold the owner liable for the value of such claim. *Rose v. Davis,* 188 N. C., 355, 124 S. E., 576.

Appellant is not demanding judgment against the contractor, and the surety or indemnitor, while apparently participating in the trial, and has filed a brief in this Court, seems not to have been named in the summons, nor did it file any pleading in the cause.

Appellant makes no point of the fact that the small amount paid into court by the plaintiff will be consumed in costs and other claims.

In this view of the record, it becomes unnecessary to discuss the liability of the surety or indemnitor, debated on oral argument and in briefs.

Affirmed.

W. A. GODDARD v. SOUTHERN DESK COMPANY.

(Filed 16 June, 1930.)

Master and Servant C b—In this case held: evidence failed to show negligent failure of employer to provide reasonably safe place to work.

Where in an action to recover damages for a personal injury sustained by the plaintiff, the evidence tends only to show that the plaintiff's foot slipped upon a cross-tie while employed in loading a log upon a carriage operated on rails, causing the injury in suit: *Held,* a judgment as of nonsuit was properly entered under the general principle that an employer's duty to provide an employee a safe place to work does not apply to "ordinary, everyday conditions" readily observable, where there is no reason to suppose that injury would result.

APPEAL by plaintiff from a judgment of nonsuit by *Stack, J.,* at January Term, 1930, of CATAWBA. Affirmed.

D. L. Russell for plaintiff.
Thos. P. Pruitt and E. B. Cline for defendant.

ADAMS, J. In connection with its business of manufacturing desks, opera chairs, and church pews the defendant operated an "out-door sawmill." The plaintiff, one of its employees, assisted in sawing the logs and bearing the lumber from the carriage. The wheels of the carriage moved back and forth upon iron rails which rested upon and were fastened to crossties by spikes. The logs were held upon the carriage by dogs or hooks. The basic allegations of the plaintiff's suit are that when in the act of placing a log upon the carriage he put his right foot upon the end or near the end of a crosstie, slipped, and fell, and that before he could get up the carriage ran against his leg and inflicted serious and permanent injury as a result of the defendant's negligent failure to provide for the plaintiff a reasonably safe place in which to do his work. It is specifically alleged that the defendant was negligent in failing to put a floor upon the crossties; but it is not alleged that the defendant knowingly or carelessly employed incompetent fellow-servants.

The two exceptions to the exclusion of evidence are so clearly untenable as to require no discussion; and the judgment of nonsuit must be affirmed upon the general principle that an employer's duty to provide for an employee a reasonably safe place in which to work does not apply to "ordinary everyday conditions" where the situation is readily observable and there is no reason to suppose that injury will result. *Smith v. Ritch,* 196 N. C., 72; *Bunn v. R. R.,* 169 N. C., 648. According to the allegation and the evidence the plaintiff's fall was due to the fact that his foot slipped from the end of a crosstie. Judgment is

Affirmed.

C. I. T. CORPORATION v. C. A. BURGESS.

(Filed 16 June, 1930.)

1. **Intoxicating Liquor F a—Innocent lienor is not entitled to possession of car as against purchaser at forfeiture sale.**

   One claiming a lien under an unregistered mortgage on an automobile seized and sold under the provisions of section 3411(f), Michie Code, 1927, after notice by publication required by the statute may not successfully maintain his action for possession of the car against the purchaser at the sale had in conformity with law, though he may not have been aware of the proceedings and had no knowledge of the unlawful use of the automobile at the time of its seizure.

2. **Same—Lien of innocent lienor attaches to proceeds of forfeiture sale of car used in transportation of intoxicants.**

   Michie's Code of 1927, sec. 3411(f) expressly transfers the lien upon an automobile seized and sold for the unlawful transportation of liquor to the proceeds of the sale, and does not deprive the lienor of his property in conflict with Constitution of North Carolina, Art. I, sec. 17, or with the Due Process Clause of the Federal Constitution, the statute prescribing notice by publication, and the mode of giving notice being peculiarly a legislative function.

APPEAL by plaintiff from *Shaw, J.*, at October Term, 1929, of MECKLENBURG. Affirmed.

Action to recover an automobile, heard upon the following statement of facts:

1. T. B. Drake bought from Asheville Overland-Knight, Inc., a Whippet coupe. He is named in the complaint as a party defendant, but he was not served with summons and is not a party to the action.

2. T. B. Drake executed and delivered to the Asheville Overland-Knight, Inc., a note in the amount of $775.68, secured by a chattel mortgage on the car hereinbefore described, which chattel mortgage was never recorded or registered in any county in North Carolina.

3. The C. I. T. Corporation is the owner and holder of said note and chattel mortgage, and there is now due and owing on said note and chattel mortgage $392.04, with interest from 9 June, 1929.

4. On 26 August, 1928, T. B. Drake, who was at that time the owner of the aforesaid automobile, was apprehended while illegally possessing and transporting intoxicating liquor in said automobile, by the sheriff of Iredell County; said sheriff at once proceeded against the said Drake, seized and took possession of said automobile, and procured a warrant for the said Drake, charging him with transporting liquor in said automobile in violation of law.

5. The said automobile was being used by the said Drake for transporting intoxicating liquor illegally, without the knowledge or consent of the C. I. T. Corporation.

6. The said Drake on 3 September, 1928, was tried for said offense of illegally transporting intoxicating liquor in said automobile, upon said warrant, issued by the recorder's court for Iredell County, a court of competent jurisdiction, and entered a plea of guilty of possessing liquor for the purpose of sale, and particularly of illegally transporting intoxicating liquor in said automobile contrary to law. Thereupon the court entered a judgment continuing the prayer for judgment for two years upon the defendant's paying the costs of the action, and said court further ordered and adjudged that said automobile be forfeited and sold by the sheriff of Iredell County as provided by law.

7. At the trial of the cause and before and after his conviction, the said Drake told the court and the sheriff that there were no liens on said automobile.

8. The sheriff of Iredell County on 5 September, 1928, in pursuance of said judgment of the court, advertised said automobile in the *States-*

ville Daily, a newspaper published in Iredell County, and at the courthouse door of said county, a copy of said advertisement being attached to this statement and made a part thereof, marked Exhibit "A"; pursuant to said advertisement and order of the court, the sheriff of Iredell County exposed said automobile to sale at public auction at the courthouse door of Iredell County on 15 September, 1928, at 12 o'clock m., at which time and place the defendant, C. A. Burgess, became the last and highest bidder for said automobile at the price of $270, and thereupon the said sheriff of Iredell County sold and delivered said automobile to the said C. A. Burgess for said sum of $270, and, no liens having been established by intervention or otherwise at the hearing or trial of the cause, or in other proceedings brought for said purpose prior to the time of the aforesaid sale of said automobile, deducted the expenses of the sale, the fee for the officer making the seizure and costs of the sale, and paid the surplus over to the treasurer of Iredell County to be used for the school fund of said county.

9. The C. I. T. Corporation was not a party to the proceeding in which said automobile was forfeited, and had no notice, actual or constructive, of the forfeiture, until after the sale of the car had been consummated and same delivered by the sheriff to the said C. A. Burgess.

10. It is agreed that the value of the said automobile at the time C. A. Burgess gave bond was $270, and that the said C. A. Burgess was an innocent purchaser of said automobile at said sale.

The notice of sale, Exhibit "A," was as follows:

"By virtue of authority contained in the Public Laws of 1923, the undersigned sheriff of Iredell County will on Saturday, 15 September, at 12 o'clock m., at the courthouse door expose to sale, to the highest bidder for cash, the following personal property: One Whippet coupe, said property having been forfeited by T. B. Drake for violations of the liquor laws of the State of North Carolina, he having plead guilty to said violations of said laws in open court.

M. P. ALEXANDER,
Sheriff, Iredell County.

This 5 September, 1928."

Upon the foregoing facts it was adjudged that the plaintiff is not entitled to the relief demanded in its complaint against C. A. Burgess, and that action be dismissed. The plaintiff excepted and appealed.

Pharr & Currie for plaintiff.
Lewis & Lewis for defendant.

ADAMS, J. T. B. Drake is not a party to this action. He bought the car on credit from the plaintiff, secured the deferred payments by a note and chattel mortgage on the property, made default, and used the vehicle for the unlawful transportation of intoxicating liquor. The chattel mortgage was not registered in Buncombe or in any other county; there was no irregularity in the sale; and the defendant was a purchaser without actual or constructive notice of the plaintiff's claim. Both before and after his conviction Drake told the judge of the recorder's court and the sheriff that there was no lien on the car. In these circumstances has the plaintiff a lien which is enforceable against the defendant Burgess?

The sale was made under the provisions of section 3411(f) of Michie's Code of 1927. A few minor changes eliminated, this section is a copy of section 26 of the National Prohibition Act. 41 Stat., 315; U. S. Compiled Sts., 10138½ mm. The Supreme Court of the United States has construed the language of section 26 as mandatory, and has held that, whenever the vehicle seized by the arresting officers is discovered in use in the prohibited transportation, literal compliance with the requirements of section 26 would compel the forfeiture of the vehicle with the consequent protection of the interests of innocent lienors. *Richbourg Motor Co. v. United States* (decided 19 May, 1930). We see no reason why section 3411(f) should not be subject to the same interpretation.

If the statute is mandatory and the vehicle is forfeited, what provision is made for the protection of innocent lienors? Upon conviction of the arrested offender the court shall order the liquor destroyed and shall direct a sale by public auction of the seized vehicle, unless the claimant can show that it is his property and that it was used in transporting liquor without his knowledge and consent. There is no express provision for giving notice to a lienholder to appear at the trial; but he is permitted to establish his lien by intervention or otherwise at the hearing if he has notice; or he may establish it by other proceedings brought for the purpose. But the lien must have been taken in good faith and must have been created without the lienor's knowledge or notice that the carrying vehicle was being used for the illegal transportation of liquor. The proceeds arising from the sale of the forfeited property, after the expense of keeping it, the fee for the seizure, and the cost of the sale are deducted, shall be applied in payment, according to their priorities, of all liens which are established by intervention or otherwise at the hearing or by other authorized proceedings. The lienor is further protected by the provision that all liens against property sold under this section shall be transferred from the property to the proceeds of the sale of the property. If no claimant of the forfeited property is found the taking of the property and a description of it shall be duly advertised, and if no claimant shall appear within ten days after the last publication of the advertisement the property shall be sold, and the proceeds less the expenses and costs shall be paid to the treasurer or officer in the county who receives fines and forfeitures, and shall become a part of the county school fund.

In this case the latter course was pursued. No claimant, other than Drake, was found; the sale was advertised under the foregoing provision; the car was sold, and the proceeds, less the expenses, were paid to the treasurer of Iredell County. It is agreed that the price paid by the defendant at the sale was the actual value of the car at that time. If by virtue of its unrecorded mortgage the plaintiff had a valid lien on the property as against Drake, the mortgagor, its lien was transferred to the proceeds of the sale. The object of transferring the lien was not only to protect the lienor, but to clear the title of the purchaser. When transferred to the proceeds of the sale the lien no longer attached to the forfeited property. It follows that the car, released from the lien and now in possession of an innocent purchaser for value, is not subject to the plaintiff's claim.

The appellant contends that section 3411(f) is in conflict with Article I, section 17, of the Constitution of North Carolina, which provides that no person ought to be deprived of his property but by the law of the land, and in conflict with the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall deprive any person of his property without due process of law. We are unable to concur with the appellant in this suggestion. In *Richbourg v. United States, supra,* it was said that "the objective of section 26 (National Prohibition Act) is not the prosecution of the offender, elsewhere provided for, but the confiscation of the seized liquor and the forefeiture of vehicles used in its transportation, to the limited extent specified in the section. . . . The provision that 'the court upon conviction of the person so arrested shall order a sale by public auction of the property seized' is mandatory and requires the forfeiture to proceed under this section." The officer's appropriation of the property is repeatedly referred to as a forfeiture. If it is a forfeiture under section 26 it is a forfeiture under section 3411(f), although the interests of innocent third persons are protected by each statute. The forfeiture is not a taking without due process of law. The owner or lienor of an automobile who entrusts it to another with authority to use it is not deprived of his property without due process of law by a statute authorizing its forfeiture if it is used by the person to whom it is entrusted in the unlawful transportation of intoxicating liquor, although such use is without the knowledge or consent of the lienor or owner. *Goldsmith-Grant Co. v. United States,* 254 U. S., 505, 65 Law Ed., 376; *Van Oster v. Kansas,* 272 U. S., 465, 71 Law Ed., 354.

But as we interpret the statute the lienor is not deprived of his property. If the property is forfeited and sold the lien is transferred; it no longer attaches to the subject of the forfeiture; and in any event the demands of the due process clause are met by giving notice by publication to unknown claimants of the seizure, and of a description of the property. The mode of giving the notice is prescribed by the statute, this being peculiarly a legislative function.

We may note in concluding that section 3411(f) differs materially from section 3403, which was construed in *S. v. Johnson,* 181 N. C., 638, and in *Motor Co. v. Jackson,* 184 N. C., 328. Judgment

Affirmed.

ORMOND E. CHAMBERS v. UNION OIL COMPANY, INC., EMPLOYER, AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 16 June, 1930.)

1. **Master and Servant F b—Ordinary risks from close economic contact of workers are assumed by employer under Workmen's Compensation Act.**

   In construing section 2(f) of the North Carolina Workmen's Compensation Act the words "arising out of the employment" in regard to injuries compensable is broad and comprehensive, and must be determined in the light and circumstances of each case, and the act, applying only to industries employing more than four workmen, contemplates the gathering together of workmen of varying characteristics, and the risks and hazards of such close contact, joking and pranks by the workmen, is an incident to the business and grow out of it, and is an ordinary risk assumed by the employer under the act.

2. **Same—In this case held: finding by Commission that injury arose out of employment was supported by evidence and is conclusive.**

   Where there is evidence that the driver of the employer's oil truck habitually carried a pistol in order to protect his employer's property, and that the employer acquiesced therein, and that the plaintiff was injured while filling a fuel tank in the course of his employment by the accidental explosion of the pistol carried by the driver when the driver threw it back into his truck after he and the plaintiff had joked about whether the pistol would shoot: *Held,* the evidence discloses that the injury arose out of the employment and is sufficient to support the finding of fact by the Industrial Commission to that effect, which is conclusive and binding on appeal. Section 60, Workmen's Compensation Act.

3. **Same—Where workman does not participate in horse-play causing his injury he is not precluded from recovering therefor.**

   If an employee is injured as a result of the horse-play of a fellow-workman the injured employee is not precluded from recovering his damages under the Workmen's Compensation Act if he did not participate therein.

CIVIL ACTION, before *Sink, Special Judge,* at April Term, 1930, of BUNCOMBE.

The plaintiff filed a claim with the Industrial Commission for compensation for an injury resulting from the accidental discharging of a pistol. Compensation was awarded by Commissioner Allen, and the defendants appealed to the Full Commission where the award was affirmed. Thereupon the defendants appealed to the Superior Court of Buncombe County. The trial judge, after hearing the cause, entered a decree "that the judgment and award of the Industrial Commission heretofore made be and the same hereby is in all respects affirmed."

The opinion by Commissioner Allen is set out in full in the record. The facts are substantially as follows: "The defendants were wholesale distributors of oil and employed the plaintiff and P. E. Loven as truck drivers to deliver oil. These drivers collected money as sales were made, and sometimes carried as much as $800. Previous to the injury complained of Loven had been held up on one of his trips and either robbed or an attempt was made to rob him. Thereafter Loven carried a pistol for the protection of his employer's property. Parker, vice-president of the defendant, thought the drivers were carrying pistols, but had no positive knowledge of that fact.

"On 7 September, 1929, the plaintiff was filling a fuel tank on a truck driven by him. The truck driven by Loven was also near the tank. Loven went to his truck to get his order book, which was in the pocket of the truck under his pistol. Loven took the pistol out of the truck and plaintiff asked him where he was going with 'that old smoke pole,' and that 'that gun won't shoot.' Thereupon Loven threw the pistol back into the truck and it accidentally discharged, the bullet entering plaintiff's foot."

There was also evidence that Loven went over to where plaintiff was at work for the purpose of showing him the pistol, and they were standing side by side when the pistol discharged. All the evidence was to the effect that the pistol discharged accidentally.

The pertinent portions of the findings of fact by the Industrial Commission are as follows: "From a consideration of all the evidence the Commissioner finds that the plaintiff sustained an injury on 7 September, 1929, which injury arose during the course of the employment; that the employer had not forbidden the carrying of pistols by its truck drivers, but in fact thought pistols were being carried by them; that inasmuch as the employer thought the drivers were carrying pistols and took no action to discourage the practice is tantamount to sanctioning such practice, and that by such sanction the ordinary dangers from such use of pistols became a hazard incident to the plaintiff's employment, hazards to which the general public is not exposed, that the accident arose out of the employment, therefore, as well as in the course of the employment; that the burden was upon the defendants to prove the alleged 'horse-play' which consists of 'sky-larking' or 'sportive acts'; that the defendants have failed to establish the fact of 'horse-play'; that at the time of the accident neither the plaintiff nor Loven had abandoned his employment; that by the greater weight of the evidence the plaintiff has met all of the requirements of the North Carolina Workmen's Compensation Act, and is entitled to recover. It is admitted in this case that claimant was at all times during the conversation between himself and his coemployee, actually engaged in the filling of a tank with oil, so it cannot be said by any view of the evidence that claimant participated in any kind of sky-larking or play," etc.

From judgment rendered by the Superior Court the defendants appealed.

Lee & Lee for plaintiff.
J. M. Horner, Jr., for defendants.

BROGDEN, J. Two questions of law are presented for decision:

First, did the injury to plaintiff arise out of and in the course of the employment?

Second, if the injury was the result of horse-play, is the plaintiff entitled to compensation?

The first question of law involves a construction of section 2(f) of the Compensation Act. The section reads as follows: "Injury and personal injury shall mean only injury by accident arising out of and in the course of employment and shall not include disease in any form, except where it results naturally and unavoidably from the accident."

The record in the case at bar discloses that the plaintiff was injured while actually engaged in the proper performance of his work. Hence it must be conceded that the injury was sustained while he was "in the course of the employment." The term "arising out of the employment" is broad and comprehensive and perhaps not capable of precise definition. It must always be interpreted in the light of the facts and circumstances of the given case. Usually the courts have insisted that there must be some causal connection between the injury and the employment. However, the basic idea of the term is that the employment of workers in industry creates certain risks to which the employees are subjected in the performance of their duties. It is apparent that the risk of one employment would differ from the risk of another employment, and, therefore, no iron rule of liability can be applied in all cases.

The Compensation Act does not apply to any industry employing less than five workmen, and hence the act itself contemplates that successful industrial operation presumes the assembling of workers in one place who are engaged in various phases of the general prosecution of the business. It is a self-evident fact that men required to work in daily and intimate contact with other men are subjected to certain hazards by reason of the very contact itself because all men are not alike. Some are playful and full of fun; others are serious and diffident. Some are careless and reckless; others are painstaking and cautious. The assembling of such various types of mind and skill into one place must of necessity create and produce certain risks and hazards by virtue of the very employment itself. This idea was expressed by the Supreme Court of New Jersey in *Hulley v. Moosbrugger,* 93 Atlantic, 79. In that case the claimant went to his employer's shop to get certain pipe fitting when a fellow-workman in a spirit of play swung his arm around either to knock off decedent's hat or strike him, whereupon the decedent in dodging the attack slipped on the descending concrete floor, fell and sustained injury which caused his death. The Court said: "In the case under consideration, it appears that the prosecutor employed young men and boys. It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow-workman is a matter of common knowledge to every one who employs labor." While this case was reversed upon the ground that the injury "was a result of horseplay or sky-larking," the fact remains that the bulk of normal American workmen possess a stratum or residuum of vivacity and good nature which frequently manifests itself in joking and harmless pranks. These things are not unnatural, but natural and the ordinary outcropping of industrial contact between men of all classes and types. Such risks, therefore, are incident to the business and grow out of it. In an ordinary suit for damages for personal injury the workman assumes the ordinary risks of the business, but the Compensation Act in such case imposes the ordinary risk of the business upon the employer. That is to say, the employer and not the workman must assume the ordinary risks of the business or employment.

In the case at bar, the injured workman was attending to the duties of his employment. A fellow-workman stepped aside for a moment to show him a pistol. The pistol had been carried habitually by the workman in order to protect his employer's property from robbery, and the employer testified: "I never said anything to my drivers about carrying weapons. . . . I will say that I thought they had them, but I had no definite knowledge of it. I knew of the fact that one of my drivers had been held up. He reported that to me." Certainly the testimony of the employer was some evidence of acquiescence in the habit of carrying weapons, indulged in by the drivers. Moreover, the Industrial

Commission has found as a fact that the accident arose out of the employment, and there was evidence to support such finding. Hence under section 60 of the Compensation Act, the award of the Commission is "conclusive and binding as to all questions of fact."

The second question of law presented by the appeal involves the application of the so-called doctrine of "horse-play" or "sky-larking." This principle is based upon the idea that if a workman is injured while engaged in play, or for an instant steps out of the line of his regular duties to communicate with a fellow-employee, he is not entitled to compensation, irrespective of whether he participated in the play or prank. The authorities bearing upon the subject are assembled in 13 A. L. R., 540; 20 A. L. R., 882; 36 A. L. R., 1469; 43 A. L. R., 492, and 46 A. L. R., 1150. The author of the annotation in 13 A. L. R., 540, says: "It is generally held that no compensation is recoverable under the Workmen's Compensation Acts, for injuries sustained through horse-play or fooling which was done independently of and disconnected from the performance of any duty of the employment, since such injuries do not arise out of the employment within the meaning of the acts." Numerous cases are cited from various jurisdictions in support of the principle of law so announced. In the same note the author continues the discussion as follows: "But in a number of cases an exception to the general rule has been recognized, and the right to compensation sustained, where an employee, who was injured through horse-play or fooling by other employees, took no part in the fooling, but was attending to his duties." Numerous cases are cited in support of this proposition.

A few of the cases illustrating the doctrine may not be amiss. For instance, in the case of *Leonbruno v. Champlain Silk Mills,* 128 N. E., 711, an employee, while engaged in the line of his duty, was struck in the eye by an apple thrown by a fellow-servant engaged in horse-play. The Court of Appeals of New York held that the injury was compensable. In *Cassell v. U. S. Fidelity & Guaranty Co.,* 283 S. E., 127, the plaintiff was engaged in his regular duties as a stage hand. The stage manager came upon the scene and in fun snapped a pistol supposed to be unloaded, at other employees and at Cassell when the pistol fired and injured plaintiff. Pistols were kept for use during theatrical performances, but there was no practice of playing with pistols which had been acquiesced in by the employer. Upon such state of facts the Supreme Court of Texas held that the plaintiff was entitled to compensation.

Indeed, if a workman be denied compensation solely upon the ground that he was injured by the "sportive act" of a fellow-workman, it would seem to be clear that the old "fellow-servant" doctrine is appearing in a brand-new suit of legal clothes and parading through the law under the brand-new name of "horse-play."

It is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery. In other words, a workman is entitled to recover irrespective of fault if the injury arises out of and in the course of the employment. The doctrine of horse-play, which excludes a workman from compensation, although he is not at fault, and does not engage therein, is inconsistent with the underlying philosophy of compensation acts, which are designed for the very purpose of eliminating fault as a basis for determining liability.

We are therefore of the opinion and so hold: First, that the evidence discloses that the claimant sustained an injury arising out of and in the course of his employment. Second, that if he was injured as a result of horse-play, he did not participate therein; and, therefore, he is not precluded from recovery. The judgment of the trial court is

Affirmed.

F. B. EFIRD v. CITY OF WINSTON-SALEM.

(Filed 16 June, 1930.)

1. **Pleadings D a—Demurrer challenges plaintiff's right to maintain the action in any view of matter.**

   A demurrer to the complaint challenges the right of the plaintiff to maintain his action in any view of the matter, admitting for the purpose the truth of the allegations.

2. **Municipal Corporations G a, G d—Ownership of street is prerequisite to power of city to levy street assessments for improvements.**

   The ownership by the city of a street is a prerequisite to the power of the city to levy an assessment for street improvements against abutting owners thereon, C. S., 2703, and where the plaintiff in an action to have the street assessments removed as a cloud upon his title alleges in his complaint that the strip of land along which the plaintiff's lands abut is owned by him and not by the city as a street, a demurrer, filed on the ground that the owner should have proceeded under C. S., ch. 56, by objecting to the assessment roll at the time, admits the private ownership of the property, and will not be sustained.

3. **Same—Upon paying damages for condemnation of street the city may assess abutting owner of property for improvements.**

   Where the plaintiff alleges a cause of action against a city for taking his lands and demands compensation therefor, a recovery of the damages would entitle the city to assess the remaining property of the plaintiff abutting the land condemned for street improvements.

4. **Municipal Corporations G b: Eminent Domain D a—City may condemn land for street and levy assessments for street improvements in same action.**

Under the provisions of C. S., 2792 (Sup., 1924), a city may in the same action proceed to acquire land for a street by condemnation and to have the assessment made for street improvements on the lands of the abutting owner.

APPEAL by defendant from *Schenck, J.,* at February Term, 1930, of FORSYTH. Affirmed.

For a *first* cause of action plaintiff alleges: That he is the owner and in possession of a tract of land of approximately 50 acres, describing same, and about one-third is within the corporate limits of the city of Winston-Salem. That on 4 March, 1927, defendant purporting to act under the authority of chapter 56, Public Laws of 1915, upon the assumption that it was a public street across a portion of the plaintiff's land, whereas it was not, levied an assessment thereon of $8,152.20, the cost of improving and paving said assumed street. That prior to the levy of the assessment and paving of the street, plaintiff protested to the defendant against the proposed work and plaintiff denied the legal right of defendant to make an assessment against his property on account of said paving; that the assessment is illegal and invalid and casts a cloud upon the title of said tract of land.

For a *second* cause of action plaintiff alleges, after making the above allegation as to ownership: That in June, 1926, the defendant took possession of a strip of plaintiff's land 50 feet wide and 550 feet in length lying in the corporate limits of defendant over plaintiff's protest and objection and paved same, assessing against the remainder of said tract for the cost of said pavement $8,152.20, and also laid across the said tract of land sewer and water lines. That defendant entered and took possession of said land and brought no proceedings for the purpose of vesting title in defendant, and there was no effort on the part of defendant to agree with plaintiff upon the purchase of the land or to acquire the right to enter thereon. That defendant's conduct was unlawful and wrongful; that plaintiff has been damaged in the sum of $2,500; that defendant declines to pay plaintiff any damages and refuses to institute condemnation proceedings to acquire title to the said land or a right to enter thereon. Pursuant to the provision of section 94 of defendant's charter the claim in writing was filed with defendant for $5,500 damages. "Wherefore, he prays that said assessment be declared illegal and invalid; that the entry thereof upon the record of the city of Winston-Salem be canceled and that said city, pending further proceedings herein, be enjoined and restrained from taking any further steps in connection with said assessment or its collection, and especially that said city be enjoined and restrained from advertising and selling the land herein described in satisfaction of said assessment; that he recover of the defendant the sum of $2,500, with interest, and the costs of this action to be taxed by the clerk."

The demurrer of defendant is as follows: "Now comes the defendant, city of Winston-Salem, and demurs to the first cause of action filed in the complaint filed in this cause, upon the ground that the cause of action alleged therein, if any, should have been called to the attention of the board of aldermen of the city of Winston-Salem, when and where objections would have been heard, and the said assessment could have been corrected. That the plaintiff did not appear as the law provides before the board of aldermen, or in anywise protested to this assessment, or in anywise appealed from the judgment making the assessment a lien on his property which is provided for under Public Laws 1915, chapter 56, and the defendant further moves the court to strike from the second cause of action that portion of paragraph 3 contained in parenthesis, the same being irrelevant." The allegation requested to be stricken out is as follows, in second cause of action: "Assessing against the remainder of said tract, for the cost of said pavement, approximately the sum of $8,152.20."

The judgment of the court below is as follows: "This cause coming on to be heard, and being heard before his Honor, Michael Schenck, judge presiding, at the February, 1930, Term of the Superior Court of Forsyth County, on the demurrer of the city of Winston-Salem to the first cause of action set out in the complaint, the grounds for the demurrer being that the plaintiff did not except to, or appeal from the confirmation of the assessment roll of the board of aldermen, in accordance with chapter 56 of the Consolidated Statutes of North Carolina, and the court being of the opinion that the demurrer should be overruled; it is therefore ordered, adjudged and decreed that the demurrer, and the same is hereby overruled, and the defendant is allowed twenty days from the entry of this judgment, or if appealed to the Supreme Court and decided adversely to the defendant, twenty days from the certificate of the Supreme Court in which to answer or otherwise plead."

The defendant excepted to the judgment for the reason set forth in the demurrer, assigned error and appealed to the Supreme Court.

Oscar O. Efird and Manly, Hendren & Womble for plaintiff.
Parrish & Deal for defendant.

CLARKSON, J. "A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting for the purpose the truth of the allegations of fact contained therein." *Meyer v. Fenner,* 196 N. C., at p. 477; *Winston-Salem v. Ashby,* 194 N. C., at p. 390.

The material question presented on this appeal is set forth in defendant's assignment of error: "That the confirmation of the assessment roll by the board of aldermen of the city of Winston-Salem precludes and bars the present contentions of the plaintiff as set out in the complaint, and that the plaintiff should have objected to the confirmation of the assessment roll at the time and place provided therefor, and should have appealed from the confirmation of the assessment roll in accordance with chapter 56 of Consolidated Statutes of North Carolina." We cannot so hold.

It seems that defendant has no local statute on the subject and its right depends on the public statutes. From the allegations set forth in the first cause of action, we think plaintiff's complaint states a cause of action. It appears from the complaint that defendant entered and took possession of plaintiff's land that it had no right of possession or title to, against his protest, paved the *locus in quo* and levied an assessment on his land. In the case of *Greensboro v. Bishop,* 197 N. C., 748, the condemnation and assessment were made in one action. See chapter 220, Public Laws of North Carolina, 1923, C. S., 2792 (Sup., 1924), a to p inclusive. In the present action, from the allegations of plaintiff's complaint, the land taken by defendant and paved was his private property and not a public street.

It is well settled that if plaintiff's land was in the city of Winston-Salem and the *locus in quo* was a street or alley of the city, the position contended for by defendant would be applicable. The statutory remedy would have to be followed. The whole street improvement statutes are bottomed on street and alley improvement, which implies ownership in the city. C. S., 2703; *Brown v. Hillsboro,* 185 N. C., 368; *Gunter v. Sanford,* 186 N. C., 452; *Leak v. Wadesboro,* 186 N. C., 683; *Vester v. Nashville,* 190 N. C., 265; *A. C. L. Ry. Co. v. Ahoskie,* 192 N. C., 258; *Mfg. Co. v. Pender,* 196 N. C., 744; *In re Sou. Ry. Co. Paving Assessment,* 196 N. C., 756; *Jones v. Durham,* 197 N. C., 127; *Noland v. Asheville,* 197 N. C., 300.

In *R. R. v. Ahoskie,* 192 N. C., at p. 260, the following is said: "Therefore, under our statute, one of the essential requisites of a valid assessment is the existence of a public street or alley. It is admitted that all of the requisites of a valid assessment appear except the one requiring the existence or establishment of a public street. The defendant contends that the property improved was a public street, and the plaintiff contends to the contrary. This was a fact to be established by evidence. An assessment, under the express language of our statute, implies the existence of a public street. If no public street existed, then no assessment can be legally laid upon abutting owners."

In *R. R. v. Ahoskie, supra,* there was a dispute of fact as to whether the land was a public street or the property of the railroad. The railroad submitted itself to the assessment procedure, protested to the work being done as the property belonged to it and not to the town of Ahoskie, and appealed under C. S., 2714, from the confirmation. The Court said, at p. 262: "The conclusion of the whole matter, therefore, is whether or not this assessment was valid. If Railroad Street is a public street of the town of Ahoskie, then the town had the right to make a valid assessment against abutting owners. If it is not a public street, then no assessment under our statute could be properly made. This is a question of fact to be determined and established by competent evidence, and, certainly, the validity of the assessment under our statutes can be challenged in the assessment proceedings."

In the present action the demurrer admits the ownership of the land in plaintiff and there is no present dispute on the record as to that fact. If the defendant had proceeded under chapter 220, Public Laws of N. C., 1923; C. S., 2792 (Sup., 1924), a to p inclusive, the condemnation and assessment could be made in one action. *Greensboro v. Bishop, supra.*

The defendant demurred *ore tenus* to the second cause of action. We think defendant's contention untenable.

From the present record, under the second cause of action, compensation will have to be paid plaintiff for the land taken by defendant. When defendant acquires title to the land, it can make an assessment on the land for street improvements.

In *Construction Co. v. Brockenbrough,* 187 N. C., p. 77, we said: "As was said in *Board of Commissioners, supra* (183 N. C., p. 302): 'Subject to certain exceptions, the general rule is that the Legislature may validate retrospectively any proceeding it might have authorized in advance.' The municipality can do the same." *Storm v. Wrightsville Beach,* 189 N. C., at p. 683; *Brown v. Hillsboro,* 185 N. C., 377; *Holton v. Mocksville,* 189 N. C., 145.

It would be inequitable for plaintiff to receive compensation for his land and obtain the street improvements also without paying a just assessment.

The second cause of action of plaintiff's complaint sets forth an action to recover damages for the land that plaintiff alleges that defendant has unlawfully and wrongfully taken and in the same action asks that the assessment lien be removed as a cloud on the title. Under the facts and circumstances of this cause, fair dealing would require that the defendant be awarded the right to levy a just assessment when defendant pays the damages for the land to plaintiff under the second cause of action. The judgment is

Affirmed.

LEWIS H. JOHNSON v. ASHEVILLE HOSIERY COMPANY AND MARYLAND CASUALTY COMPANY.

(Filed 16 June, 1930.)

1. **Master and Servant D a, F b—Workman under direction of employer is not independent contractor and Compensation Act applies.**

   An independent contractor is one who is to complete the subject-matter of his contract under the terms thereof independently of direction or control of the other party to the contract as to the manner or method by which the work is to be accomplished, and where a person claiming compensation under the Workmen's Compensation Act is injured while doing work under the direction of the employer as the work progressed he may not be denied his claim upon the ground that he was an independent contractor at the time of his injury.

2. **Master and Servant F a—Workmen's Compensation Act should be liberally construed.**

   The Workmen's Compensation Act is to be construed liberally to effectuate the broad intent of the act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose.

3. **Master and Servant F b—In this case held: employment was in furtherance of general business and was not casual, and Compensation Act applied.**

   The restriction of the Workmen's Compensation Act excluding injuries sustained in casual employment will not exclude an applicant under the provisions of the act when he sustains injuries in the course of the general trade, business etc., of the employer and material or expedient therein, and the painting of the interior of a machine room to give the employees therein a better light or for the protection of the permanent structure is not a casual employment and is one in the general course of business, and the Workmen's Compensation Act applies to an injury received by a workman engaged in such painting.

4. **Same—Although employment is casual Compensation Act applies if the employment is in furtherance of the general business, trade, etc.**

   Section 14(b) of the Workmen's Compensation Act providing that the act shall not apply to casual employees, is not totally repugnant to section 2(b) providing for compensation for an injury to an employee while "in the course of the trade, business," etc., and an employee is entitled to compensation even if the employment is casual if he is injured in the course of the trade, business, etc.

CIVIL ACTION, before *Sink, Special Judge,* at April Term, 1930, of BUNCOMBE.

The plaintiff filed a claim with the Industrial Commission under the Workmen's Compensation Act for injuries sustained in falling off a scaffold while engaged in painting a factory of the defendant. The plaintiff was a painter and was called by the defendant to repair a spray gun at its plant. While performing this work the plaintiff was employed to paint the ceiling of the factory of defendant at an agreed price of $1.25 per hour. The defendant furnished the paint and a helper. No time was fixed in which the work was to be completed. The room in which the plaintiff was painting the ceiling was occupied by machinery and used in the regular business of defendant. It was advisable to paint the ceiling white in order to afford more light in the room. The evidence tended to show that the defendant told the plaintiff "when to paint and where," and furthermore, that the defendant had the right under the verbal contract to discharge the plaintiff at any time the work was not progressing to its satisfaction. Mr. Baer, an official of the defendant, was asked the following question: "Do you consider painting the mill as incidental to your operating, that is, in the course of your business as a hosiery manufacturer?" The witness answered: "Yes, sir, it would be a part of the maintenance of the mill the same as it is necessary to keep the roof repaired. It is not absolutely necessary that the ceiling be painted and kept painted in a light color in order to afford the proper light for the employees, but it is better. It also protects the ceiling; like the roof and girders, it is subject to the actions of the elements." There was evidence to the effect that it would require about four days to complete the work.

The cause was heard by Commissioner Dorsett and an award made.

Upon appeal to the Full Commission it was found as a fact "that on 14 July, 1929, the plaintiff was injured, the said injury resulting from an accident arising out of and in the course of certain employment." The Full Commission affirmed the award and there was an appeal to the Superior Court. The judge of the Superior Court affirmed the judgment and award of the Industrial Commission, from which judgment the defendant appealed.

Lee & Lee for plaintiff.
J. C. Cheesborough for defendant.

BROGDEN, J. Two questions of law are presented by the record:

1. Was the plaintiff an independent contractor and therefore not entitled to compensation?

2. Was the employment "both casual and not in the course of the trade, business, profession or occupation of his employer?"

Upon the facts appearing in the record, the first question of law must be answered in the negative. "An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods and without being subject to his employer except as to the results of the work and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses." *Greer v. Construction Co.*, 190 N. C., 632, 130 S. E., 739. The principle thus announced is amply supported by the authorities assembled in the *Greer case, supra.*

In the case at bar the employer directed the progress of the work and reserved control of the plaintiff and other workmen. These facts exclude the theory of independent contractor.

The second question of law involves the construction of section 2(b) of the Compensation Act. Said section undertakes to define the word employment and specifically excludes from the operation of the act "persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer," etc. By virtue of the express terms of the statute, in order to exclude an employee, his employment must be casual, and in addition thereto, not in the course of the business of the employer. In other words, even if the employment be casual, the employee is not deprived of the benefits of the act if the employment is in the course of the business of the employer. It is further provided in section 60 that the award of the Commission "shall be conclusive and binding as to all questions of fact." However, errors of law are reviewable.

It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. Hence it is generally held that provisos excluding an employee from the broad and comprehensive definition of such term ought to be strictly construed in order that the predominating purposes of the act may be fully effectuated. *National Cast Iron Pipe Co. v. Hegginbotham,* 112 Southern, 734; *Eddington v. Northwestern Bell Telephone Co.*, 202 N. W., 374.

Appellate courts throughout the nation have adopted divergent views in interpreting the word "casual" and the words "course of the trade, business, profession or occupation of his employer." These views, however, are produced by the variable wording of given statutes. In some instances, if the employment is casual, the injured employee is not entitled to the benefits of the statute. In others, if the employment is not in the course of the employer's business, the injured employee is not entitled to the benefits of the statute. However, under the terms of our statute, in order to exclude an employee, the employment must be "both casual and not in the course of the trade, business," etc.

The Virginia Court in *Hoffer Bros. v. Smith,* 138 S. E., 474, said: "The test is the nature of the employment and not the nature of the contract. An employment cannot be said to be casual where it is in the usual course of the trade, business, or occupation of the employer. But it is casual when not permanent nor periodically regular, but occasional or by chance, and not in the usual course of the employer's trade or business." It has also been generally held that the kind of work done and not the duration of service is the determining factor. So that, if the work pertains to the business of the employer and is within the general scope of its purpose, the employment is not of a casual nature, although the hiring be for only a short period of time. *De Carli v. Business Warehouse Co.,* 140 Atl., 637. Thus it has been held that making repairs on a building owned by a creamery is within the usual course of the business of the employment, and, therefore, compensable. *Gross et al. v. Industrial Commission,* 167 N. W., 809. Furthermore, it has been held that even though the employment is casual, the injury is compensable if occurring within the course of the employer's business. *Pershing v. Citizens' Traction Co.,* 144 Atlantic, 97; *Hoshiko v. Industrial Commission,* 266 Pac., 1114; *Pfister v. Doon Electric Co.,* 202 N. W., 371.

In the case at bar the defendant was operating a factory for manufacturing hosiery and used machinery therein for such purpose. In order to facilitate the work and to render the machine-room reasonably safe for operatives, it was necessary to perfect the lighting arrangement of the room. It was conceived that the painting of the ceiling of the room in white or a light color would add to the safety and facility of operation. The defendant, as an employer of labor, was bound in the exercise of reasonable care to furnish light for the operation of machinery. Whether he furnished the necessary light by means of electricity or by painting the ceiling, or both, was immaterial so far as plaintiff was concerned, if, as a matter of fact, at the time of his injury, he was engaged in an employment incident to the proper operation of the factory. An official of the defendant testified that he considered "painting the mill as incidental to operation," and, as such, it would be a part of the maintenance of the mill, "the same as it is necessary to keep the roof repaired."

Even though it be conceded that the employment of the plaintiff was casual, he is not precluded from the benefits of the Compensation Act unless it should also appear that he was not engaged in the course of the trade, business, profession or occupation of his employer. The Industrial Commission found as a fact that the plaintiff was engaged in the course of the employer's business, and there is evidence in the record to support such finding. In such event, whether the Appellate Court agrees with the conclusion of the Commission or not, the finding of such fact is conclusive, by express declaration of the statute.

Moreover, the *Higginbotham case, supra,* is a direct authority for the award made by the Industrial Commission. In that case the defendant operated a large industrial plant and owned about 101 houses for the use of employees. It kept no regular force of painters, but only repaired and painted as deterioration necessitated. The plaintiff was employed by the day and was injured as a result of the falling off a ladder upon which he was standing. The Alabama Compensation Act by express terms did not apply to "persons whose employment at the time of the injury is casual and not in the usual course of the trade, business, profession or occupation of the employer," etc. Thus the Alabama act is practically identical with the North Carolina statute. The Court held that the injured employee was performing the incidental and necessary repair work on the employer's house, and, therefore, entitled to the benefits of the Compensation Act.

Section 14(b) of the North Carolina Compensation Act provides that "this act shall not apply to casual employees, farm laborers," etc. This section, however, is not totally repugnant to section 2(b) for the reason that even if the employment be casual the employee is still entitled to compensation if he was injured while "in the course of the trade, business, profession or occupation of his employer," etc.

Upon the whole record we are of the opinion that the award was properly made, and the judgment is

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF ALLEN J. MAXWELL, COMMISSIONER OF REVENUE, v. HANS REES' SONS, INC.

(Filed 16 June, 1930.)

1. **Taxation B f—Statute levying income tax on foreign corporations in proportion to property in the State is constitutional.**

   The State statute taxing the income of a foreign corporation in proportion as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction of encumbrances thereon and expressly excluding from the meaning of the words "tangible property" moneys in bank, shares of stock, bonds, notes, credits, evidences of debt, applying equally to domestic corporations, is not arbitrary or unreasonable, nor does it impose a burden on interstate commerce, and the statute is constitutional upon its face.

2. Same—Operation of statute levying income tax on foreign corporations held not unconstitutional.

Where the manufacturing plant of a foreign corporation is in this State and its warehouse and distributing point is in another State, the corporation cannot maintain that its profits are derived from the separate operations of buying raw materials, manufacturing, and selling, and that therefore the greater proportion of its profits are derived from operations outside the State and that the State statute levying a tax on its income in proportion to the property inside the State is to its property outside the State is unconstitutional in its operation, the buying, manufacturing and selling being component parts of one operation, and the statute prescribes a fair, reasonable and constitutional method of taxing the property within the State.

3. Same—Exclusion of evidence offered to show that statute taxing income of foreign corporations operated unconstitutionally held not error.

Where a foreign corporation has paid its income tax in this State under the provisions of a valid statute, evidence introduced for the purpose of showing that in the instant case the statute was unconstitutional in its operation is properly excluded where it is not material or relevant for the purpose.

4. Taxation E c—Where tax is paid without protest action to recover the tax will not lie.

Where a foreign corporation pays an income tax assessed by the State under protest, but pays without protest such tax assessed for the previous years, its protest for the one year does not entitle it to maintain an action to recover the taxes paid without protest on the ground that the tax was wrongfully collected.

CIVIL ACTION before *McElroy, J.*, at November Term, 1928, of BUNCOMBE.

On 17 August, 1927, the defendant filed a petition with R. A. Doughton, Commissioner of Revenue, "for a rehearing and readjustment of the income tax assessed against it for the years 1923, 1924, 1925, and 1926." The defendant duly filed income tax returns for said years in accordance with the requirements of chapter 4, section 201 of the Public Laws of 1923, and section 201 of chapter 101 of the Public Laws of 1925. These returns are contained in the record and we deem it unnecessary to recapitulate them. On 11 March, 1925, the defendant paid without protest the sum of $3,959.88, the amount of income tax as shown by its return. On 14 March, 1925, the defendant paid without protest the sum of $5,221.90, the amount of tax due for the year 1924, according to its return. On 15 March, 1926, the defendant paid without protest the sum of $3,453.28, same being the amount of tax due for the year 1925, according to its return. On 11 April, 1927, the defendant paid under protest the sum of $3,651.46, same being the tax computed according to its return.

Thereafter the Commissioner of Revenue audited the returns filed by the defendant and assessed an additional tax. After making an examination of the returns the Commissioner of Revenue reported to the defendant as follows:

1923.

"Income reported to this department was $230,279.40 to which was added debts reclaimed not included in original report of $2,552.50 and allowed dividends in the sum of $904.00, which left net income corrected to $231,927.90. You reported for the purpose of allocating income to this department total valuation of property of $1,582,297.99. He reported total value of the property allowable for allocation purposes consisting of inventories, land, buildings, machinery, equipment, furniture and fixtures of $1,148,114.14. This operated to increase your percentage from .5732 to .837. This percentage of net income of $231,927.90 equals $194,123.65 taxable at 3 per cent and results as follows:

At 3 per cent	$5,823.61
Previously paid	3,959.88
Balance	1,863.73
Interest	260.92
Total additional	2,124.65

1924.

For this year you reported $253,921.82 to which the deputy added income tax deducted, which is not allowable under the North Carolina law, of $3,959.88, making total net income of $257,881.70. You reported assets as a whole for allocation purposes of $2,241,654.94. He reduced this amount to $1,792,110.61. For this year he also reduced property in North Carolina from $1,536,861.36 to $1,529,323.24, allowing in both instances only inventories, land, buildings, machinery, equipment, furniture, fixtures, etc. This increased your percentage in North Carolina from .6855 to .8589. This percentage of the net income above stated makes income taxable to North Carolina $221,494.59 and results as follows:

Tax at 3 per cent	$6,644.84
Previously paid	5,221.90
Balance	1,422.94
Interest	113.83
Total additional	1,536.77

1925.

You reported as net income $139,043.43. The books showed income $141,339.53, plus State income tax deducted $5,221.90, making correct income $146,561.43. You reported property value as a whole for allocation purposes $2,293,929.85. After eliminating items included which are not permitted under the law this amount was reduced to $2,147,097.12 and percentage increased from .6209 to .6632. This percentage of the total net income is $97,217.13 and results as follows:

Tax at 4 per cent	$3,888.68
Previously paid	3,453.28
Balance	435.40
Interest	8.71
Total additional	444.11

I wish to state with reference to change in property values that under the law and decisions of this department (concurred in by the Attorney-General) that all cash, bills receivable, good will, stock in other corporations and property of like character is not allowed to be used as tangible property within the meaning of the act for the purpose of allocating income to this State.

I sincerely trust that the above is clear and that you will favor me with your check as requested in my previous letter."

A hearing was had by the Commissioner of Revenue, and on 22 February, 1928, the said Commissioner made certain findings of fact and conclusions of law which are set out in the record. These findings of fact are to the effect that the defendant in its original return had included "both tangible and intangible assets, disregarding the provision of section 311 of the Revenue Act which specifies that only real estate and tangible personal property may be used in such allocation." The same reason is given for the changes made in the returns for the years 1924, 1925, and 1926. Thereupon the Commissioner of Revenue denied the petition of defendant. Thereafter the defendant filed certain exceptions to the findings of fact and conclusions of law made by the Commissioner which were overruled by the Commissioner, and the defendant appealed to the Superior Court of Buncombe County and waived a jury trial.

The cause was heard and the following judgment entered:

"This cause coming on to be heard before his Honor, McElroy, J., jury trial having been waived, it being agreed that his Honor should find the facts with the same force and effect as by jury trial and render judgment thereon, it being admitted that the Commissioner of Revenue in assessing the tax complained of has followed the method set forth in section 311 of the Revenue Act of 1927, subsection A, and similar sections of the act of 1923 and 1925, and that the valuation fixed for the real estate and tangible property of the complaining taxpayer, both within and without the State, is admitted to be correct, and that the total net income of the complaining taxpayer used for a basis of calculation by the Commissioner of Revenue is admitted to be correct, and that the allocation thereof for the purposes of taxation was made in accordance with the method indicated in the statute referred to, the complaining taxpayer having offered testimony as appears in the record, over the objection of the State, and upon the conclusion of the testimony the State having moved to strike out the testimony offered as immaterial, and the court being of the opinion that such testimony is immaterial, allows the motion to strike out and holds upon the admission of the taxpayer that the statutory method has been followed and that the tax levied by the Commissioner of Revenue is a valid tax and that the section authorizing the said levy is not in violation of any constitutional rights of the taxpayer. It is therefore ordered and adjudged that the action be dismissed at the cost of the taxpayer."

From the foregoing judgment the defendant appealed.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for the State.

Harkins & Van Winkle for defendant.

Louis H. Porter, 30 Broad Street, New York City, of counsel for defendant.

BROGDEN, J. Certain admissions were made by the defendant at the hearing in the Superior Court and set forth in the judgment. In substance these admissions were:

(a) In assessing the tax the Commissioner of Revenue followed the statutory method prescribed in chapter 4, section 201 of the Public Laws of 1923, chapter 101, section 201 of the Public Laws of 1925, and section 311 of chapter 80 of the Public Laws of 1927; (b) that the valuation of the real estate and tangible property of the taxpayer "both within and without the State" is correct; (c) that the total net income used as a basis for the calculation of tax is correct; (d) that the allocation of the net income for purposes of taxation was in full accord with the statute.

Therefore, the only defense left to the complaining taxpayer is the assertion that the statutes are unconstitutional. The attack upon the statutes is based upon the contention that they are so "arbitrary and unreasonable as to be repugnant to the commerce clause and the Fourteenth Amendment to the Federal Constitution."

The taxing statute is as follows: "Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent of the entire net income as herein defined, received by such corporation during the income year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to four per cent of a proportion of its entire income to be determined according to the following rules:

"(a) In case of a company other than companies mentioned in the next succeeding section, deriving profits principally from the ownership, sale or rental of real estate or from the manufacture, purchase, sale of, trading in, or use of tangible property, such proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

"(b) In case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this State for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the State.

"(c) The words 'tangible personal property' shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise and shall not be taken to mean money deposits in bank, shares of stock, bonds, notes, credits or evidence of an interest in property and evidences of debt."

An examination of the statute discloses that the "fair cash value" of the real estate and tangible personal property of the taxpayer in this State, is the numerator, and the "fair cash value" of all real estate and tangible property owned by the taxpayer is the denominator of a fraction, used by the Commissioner of Revenue in measuring and determining the amount of tax on net income due the State of North Carolina. Obviously, changes in either the numerator or denominator, the other remaining constant, would affect the value of the fraction and consequently the amount of collectible revenue. Moreover, by express provision "tangible personal property" is so defined as to exclude bank deposits, shares of stock, bonds, notes, credits or evidence of an interest in property and evidences of debt.

This method of measuring the tax on net income has been approved by the Supreme Court of the United States in the case of *Underwood Typewriter Co. v. Chamberlain,* 254 U. S., 113. The principles of law announced therein have been approved in subsequent decisions of that Court, notably: *Bass, Ratcliff & Gretton v. State Tax Commission,* 266

U. S., 271; *National Leather Co. v. Mass.,* 279 U. S., 413; *International Shoe Co. v. Shartel,* 279 U. S., 429. Furthermore, the pertinent portion of section 22 of the Connecticut statute, construed in the *Underwood case, supra,* is substantially identical with ours.

Manifestly, the North Carolina statute is not unconstitutional upon its face. It applies equally to both domestic and foreign corporations. It taxes net income only. It does not undertake either in express terms or by implication to impose a burden upon property not subject to the jurisdiction of this State. It is an accepted principle of the law of taxation that "property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed upon the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchise within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly therein), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." *U. S. Glue Co. v. Oak Creek,* 247 U. S., 321. In the same case the Supreme Court of the United States, discussing an income tax, said: "Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." The same principle was stated in *Atlantic Coast Line v. Doughton,* 262 U. S., 413, in these words: "That a state may, consistently with the Federal Constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in *Shaffer v. Carter,* 252 U. S., 37."

The petitioning taxpayer apparently conceding in its brief that the statute is constitutional upon its face, contends that the execution thereof and the application thereof to its business works out an unreasonable and highly arbitrary result and thus effects a denial of its constitutional rights. In order to establish this proposition certain evidence was introduced in the trial court. This evidence tended to show that the petitioner was incorporated in the State of New York in 1901 and is engaged in the business of tanning, manufacturing and selling belting and other heavy leathers. Many years prior to 1923 it located a manufacturing plant at Asheville, North Carolina, and after this plant was in full operation dismantled and abandoned all plants which it had heretofore operated in different states of the Union. The business is conducted upon both wholesale and retail plans. The wholesale part of the business consists in selling certain portions of the hide to shoe manufacturers and others in carload lots. The retail part of the business consists in cutting the hide into innumerable pieces, finishing it in various ways and manners and selling it in less than carload lots. In order to facilitate sales a warehouse is maintained in New York from which shipments are made of stock on hand to various customers. The tannery at Asheville is used as the manufacturing plant and a supply house, and when the quantity or quality of merchandise required by a customer is not on hand in the New York warehouse a requisition is sent to the plant at Asheville to ship to the New York warehouse or direct to the customer. The sales office is located in New York and the salesmen report to that office. Sales are made throughout this country and in Canada and Continental Europe. Some sales are also made in North Carolina. Certain finishing work is done in New York. The evidence further tended to show that "between forty and fifty per cent of the output of the plant in Asheville is shipped from the Asheville tannery to New York. The other sixty per cent is shipped direct on orders from New York. . . . Shipment is made direct from Asheville to the customer."

The petitioner also offered evidence to the effect that the income from the business was derived from three sources, to wit: (1) buying profit; (2) manufacturing profit; (3) selling profit. It contends that buying profit resulted from unusual skill and efficiency in taking advantage of fluctuations of the hide market; that manufacturing profit was based upon the difference between the cost of tanning done by contract and the actual cost thereof when done by the petitioner at its own plant in Asheville, and that selling profit resulted from the method of cutting the leather into small parts so as to meet the needs of a given customer.

Without burdening this opinion with detailed compilations set out in the record, the evidence offered by the petitioner tends to show that for the years 1923, 1924, 1925, and 1926, the average income having its source in the manufacturing and tanning operations within the State of North Carolina was seventeen per cent.

Upon such evidence the petitioner earnestly contends that the taxing statute of North Carolina in its operation and application is unreasonable and arbitrary, and hence repugnant to the Federal Constitution.

The fallacy of this conclusion lies in the fact that the petitioner undertakes to split into independent sources, income which the record discloses was created and produced by a single business enterprise. Hides were bought for the purpose of being tanned and manufactured into leather at Asheville, North Carolina, and this product was to be shipped from the plant and sold and distributed from New York to the customer. The petitioner was not exclusively a hide dealer or a mere tanner or a leather salesman. It was a manufacturer and seller of leather goods, involving the purchase of raw material and the working up of that raw material into acceptable commercial forms, for the ultimate purpose of selling the finished product for a profit. Therefore, the buying, manufacturing and selling were component parts of a single unit. The property in North Carolina is the hub from which the spokes of the entire wheel radiate to the outer rim.

Manifestly, by virtue of the intimate and inseparable relation between the various departments of the business it would be impossible for the Legislature to allocate with mathematical accuracy or precision the profits earned within this State. This idea was expressed in the *Underwood case, supra,* as follows: "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this is was typical of a large part of the manufacturing business conducted in the State. The Legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State." It is true that, in the *Underwood case* the Supreme Court of the United States, quoting from the Connecticut Court, asserted that the burden was upon the taxpayer to show that the amount of tax assessed by the State of Connecticut was not reasonably attributable to the manufacturing operations within the State. Certainly, this could not be shown, as the petitioner has sought to do in this case, by splitting up a single business into component parts and dividing the indivisible in order to reduce the tax. Indeed, in the *Underwood case* the taxpayer attempted to show that more than a million and a quarter of its net profits was received in other states and only a negligible part in Connecticut, and from such fact reasoned that a tax assessment of forty-seven per cent was unreasonable and arbitrary. The Court, however, remarked: "But this showing wholly fails to sustain the objection."

Again in *Bass, Ratcliff & Gretton v. State Tax Commission,* 266 U. S., 271, the Court said: "So in the present case we are of opinion that, as the company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions, beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the state was justified in attributing to New York a just proportion of the profits earned by the company from such unitary business." *Adams Exp. Co. v. Ohio,* 165 U. S., 194.

The trial judge struck out all the evidence offered by the petitioner upon the ground that it was immaterial. This ruling, as we interpret the law, is correct for the reason that the tax was computed in accordance with a statutory method which has been approved by the court of supreme authority. Furthermore, it is admitted in the record that the method was properly applied to the net income of the petitioner. Hence, if a proper statutory method for measuring a tax has been properly applied, that ought to end the case. But conceding that the evidence was competent, it shows beyond doubt that the petitioner was conducting a unitary business as contemplated and defined by the courts of final jurisdiction, and, if so, it is not permissible to lop off certain elements of the business constituting a single unit, in order to place the income beyond the taxing jurisdiction of this State.

The Commissioner of Revenue contends that at all events the portions of tax paid by the petitioner voluntarily and without objection or compulsion cannot be recovered even though the tax be levied unlawfully. This contention is sound and is supported by authority. *Blackwell v. Gastonia,* 181 N. C., 378, 107 S. E., 218; *Mfg. Co. v. Commissioners,* 196 N. C., 744, 147 S. E., 284; *Henrietta Mills v. Rutherford,* 50 Supreme Court Reporter, 270.

We are of the opinion and so hold that the taxing statutes are constitutional and therefore do not invade the domain of the commerce clause or the Fourteenth Amendment of the Federal Constitution. Neither is the execution or practical operation of the statutes unreasonable or arbitrary, and the judgment of the Superior Court of Buncombe County is

Affirmed.

W. M. TAFT v. F. P. COVINGTON AND WIFE, SUSAN H. COVINGTON, AND W. E. EWING AND WIFE, JOSIE EWING.

(Filed 16 June, 1930.)

1. **Husband and Wife B e—A married woman may execute certain executory contracts and is liable on negotiable instrument signed by her.**

A married woman may now make executory contracts as binding as if she were a *feme sole,* C. S., 2507, with certain restrictions, C. S., 2515, and when she has executed a note as co-maker with her husband, a holder in due course for value, may accordingly enforce collection thereof against her as a person primarily liable on the note, and absolutely required to pay it. C. S., 2977.

2. **Bills and Notes A a—Consideration for negotiable instrument is presumed.**

   It is prima facie presumed that a negotiable instrument is supported by valuable consideration, C. S., 3004, and that all signers thereof are parties and liable thereon; partial failure of consideration is a defense *pro tanto* whether in an ascertained or unliquidated amount. C. S., 3008.

3. **Same—Wife may not set up want of consideration as against holder of negotiable note signed by her.**

   Where a husband and wife execute a purchase-money negotiable note for lands conveyed to him and secured by a mortgage, and suit against them is brought on the note, the *feme covert* may not set up the defense of want of consideration moving to her or give evidence to that effect in contradiction of the negotiable instrument she has signed with her husband, her remedy being by suit to reform the instrument for mutual mistake or mistake induced by fraud in order for the defense that she signed the note merely to convey her dower right to be available to her.

4. **Bills and Notes D b—Accommodation party is liable to holder of note in due course for value.**

   One signing a negotiable instrument as an accommodation party, having received no value, is bound to the payment thereof to a holder for value in due course though taking with notice, C. S., 3009, and a maker of the instrument engages that he will pay it in accordance with its tenor, and admits the existence of the payee and his capacity to endorse. C. S., 3041.

5. **Bills and Notes H a—The burden of proving lack of consideration for note is on the defendant, the note having been proven.**

   In an action on a note the burden of proving lack of consideration therefor is on the defendant, the execution of the note having been established, and where in an action on a note the plaintiff introduces the note signed by a husband and wife given for the purchase price of a tract of land sold to the husband, the wife is not entitled to a directed verdict on the plaintiff's evidence on the theory that she signed the note only in order to convey her dower right in the land, she having introduced no evidence.

APPEAL by plaintiff from *Stack, J.,* at September Term, 1929, of MONTGOMERY. Reversed.

The plaintiff on 4 March, 1920, sold and conveyed to F. P. Covington and W. E. Ewing a tract of land in Montgomery County, containing about 129 acres. To secure the payment of the purchase money, on the same day, the following note, secured by mortgage on the land, was made to plaintiff:

"$2,678.00. Mount Gilead, N. C., 4 March, 1920.

Six months after date, for value received, we promise to pay to the order of W. M. Taft, twenty-six hundred and seventy-eight no/100 dollars,

Negotiable and payable without offset at the office of the Bank of Mount Gilead, Mount Gilead, N. C., with interest after date, at the rate of 6 per cent per annum, until paid. The drawers and endorsers and all sureties hereto severally waive presentment for payment, protest and notice of protest and nonpayment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them. Witness our hands and seals. This note secured by first mortgage on real estate.

F. P. COVINGTON
SUSAN H. COVINGTON (Seal.)
W. E. EWING
JOSIE EWING (Seal.)

On back:

June, 1920, paid $85.83.
25 July, 1927, paid $426.00."

The deed and mortgage were duly recorded. This action is to recover of the defendants the principal of the note with interest, less credits of $426.00 and $85.83, and to foreclose the mortgage.

Plaintiff also sues to recover for certain taxes paid by plaintiff assessed on the land and the penalty. Plaintiff proved the execution of the note and mortgage by defendants, placed same in evidence and made demand and showed nonpayment.

The plaintiff testified, in part, on cross-examination:

"I think this was all the same date, I took mortgage as security for the note. They paid no money. I bought this land and sold it to Mr. Covington and Ewing right away. Mr. A. D. Bowles, of Pekin, made me the deed. Mr. Covington worked up the trade. He was not representing me in transaction of this kind.

Q. (by the court) This note that was given for the purchase price of the land? Answer: Yes sir. Plaintiff objects; overruled; exception.

Q. And the mortgage secured the note? Answer: I did not understand it secured the note.

Q. Did these women get anything by the transaction, except their husbands got the land? Plaintiff objects; overruled; exception. Answer: Not that I know of.

Q. Did you not pay them anything to sign it? Answer: No, sir; it is all one transaction in a way, but my understanding is, when anybody signs a note this is a promise to pay.

Q. The deed to the land and the mortgage and the note was in pursuance of one agreement wasn't it? Plaintiff objects; overruled; exception. Answer: Yes, sir.

Q. State whether or not you accepted the signatures of F. P. Covington and W. E. Ewing to the mortgage and the note as the sole security for the payment of the purchase price thereof. Defendant objects; overruled; exception. Answer: I did not.

Q. (by the court) What did they get for signing the paper? Answer: I don't know whether they got anything or not.

Q. Did you sell any land to the women? Answer: No.

Q. Did you have any conversation with them about the land? Answer: No.

Q. State whether or not the signatures of Mrs. Susan H. Covington and Mrs. Josie Ewing was part of the consideration moving to you for the sale of this land to their husbands? Defendants object; overruled; exception. No answer.

Q. State why you obtained the signatures of Mrs. Covington and Mrs. Ewing to the note? Defendants object; overruled; exception. Answer: I considered the note was stronger with their signatures. Stronger note, worth more money, better security than just the deed of trust."

The plaintiff excepted to the issues as tendered and also tendered issues which the court below refused and plaintiff excepted.

The issues submitted to the jury and their answers thereto, were as follows:

"1. In what amounts, if anything are the defendants, F. P. Covington and W. E. Ewing, indebted to the plaintiff on the note and mortgage sued on? Answer: $3,824.50 (by consent).

2. In what amount, if anything, are the defendants, Susan H. Covington and Josie Ewing, indebted to the plaintiff on the note and mortgage sued on? Answer: Nothing."

On the second issue the plaintiff requested the court below to give the following charge: "If the jury believes the evidence, or any part thereof, and find the facts in accordance therewith, they are instructed to answer the second issue $3,824.50." The court below refused this instruction. Plaintiff excepted.

At the close of plaintiff's evidence, the defendants not having submitted any evidence, the court stated that he would charge the jury that, if they believed the evidence and found the facts in accordance therewith he would instruct them that the defendants, Susan H. Covington and Josie Ewing, signed the mortgage and note set out in the complaint for the purpose of barring their dower rights only, and that the jury should answer the second issue submitted to the court, Nothing." To this charge plaintiff excepted.

Plaintiff duly made assignments of error to the exceptions taken above and appealed to the Supreme Court.

Armstrong & Armstrong for plaintiff.
Poole & Bruton for defendants.

CLARKSON, J. We think the evidence excepted to by plaintiff and to which he assigned error, and the request by plaintiff for prayer for instruction, should have been granted.

The mortgage made by F. P. Covington and W. E. Ewing to the plaintiff for purchase money on the land they purchased from plaintiff need not have had the joinder of their wives to be effectual to pass the whole interest, according to the provisions of the mortgage. C. S., 4101. This is immaterial, as we are dealing with defendants' liability on the note. *Trust Co. v. Black,* 198 N. C., at p. 221. The note is negotiable. Susan H. Covington and Josie Ewing, being *sui juris,* signed the negotiable note with their husbands, the note reciting "for value received." C. S., 3166.

C. S., 2507, is as follows: "Subject to the provisions of section 2515 of this chapter, regulating contracts of wife and husband affecting corpus or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of Article X of the Constitution, and her privy examination as to the execution of the same taken and certified as now required by law." The effect of the Martin Act (this section) is to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, *sui juris.* This section is held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by section 2515, must still be observed, and except in conveyances of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married woman can now make any and all contracts so far as "to affect her real and personal property," in the same manner and to the same effect as if she were unmarried. N. C. Code, 1927 (Anno.), p. 853, citing numerous authorities.

C. S., 2977: "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." A surety on an instrument comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the instrument, absolutely required to pay the same. *Rouse v. Wooten,* 140 N. C., 557, 559. Joint makers upon the face of a negotiable instrument are deemed to be primarily liable thereon, and in an action upon the note the burden is upon the defendants to prove any matter in release. *Roberson Co. v. Spain,* 173 N. C., 23; *Howell v. Roberson,* 197 N. C., at p. 573-4.

C. S., 3004: "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

C. S., 3008: "Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise."

C. S., 3009: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

C. S., 3041: "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

In *Hunt v. Eure,* 188 N. C., 716, the note was payable to J. Marvin Hunt, and it was held unnegotiable and a consideration is not presumed and must be both averred and proved. At p. 719 it is said: "In such case the burden of proving a consideration is upon the plaintiff. If the note, though unnegotiable as in the present case, recites value, the plaintiff makes out a prima facie case by showing the execution and delivery of the note. If the defendant then offers evidence tending to establish a failure of consideration, the burden remains with the plaintiff to satisfy the jury by the preponderance of all the evidence that the contract is supported by a valuable consideration. The defendant when sued on a nonnegotiable paper is not required under our decisions to rebut the prima facie proof of value by the greater weight of the evidence."

In *Swift & Co. v. Aydlett,* 192 N. C., at p. 348, we find: "The note, being in form a negotiable instrument, imports prima facie a consideration, and where the defense of failure or want, of consideration is interposed to defeat a recovery, as in the instant suit, the burden, of course, is on the maker to establish the defense by the greater weight of the evidence. *Piner v. Brittain,* 165 N. C., 401; *Hunt v. Eure,* 188 N. C., 716."

Cowan v. Williams, 197 N. C., 433: "It would seem that the plea of *nudum pactum* is not open to the defendant, Lucy Williams, as against the plaintiff, who is a holder in due course of the note sued on. Hence the instruction, above set out, which forms the basis of one of the plaintiff's exceptions, we apprehend, should be held for error. *Angier v. Howard,* 94 N. C., 27. A note under seal imports consideration, and it is presumed from the use of a seal, that the consideration is good and sufficient," citing numerous authorities.

In *Building & Loan Association v. Swaim,* 198 N. C., 14, the wife gave a note to the Building & Loan to pay her husband's defalcation. At pp. 17 and 18, it is said: "There was no new consideration for the defendant's note. The initial debt was not canceled and the plaintiff is not precluded from proceeding against the debtor's estate. The widow by executing the note has received no benefit; she has acquired nothing from her husband's estate that she would not have been entitled to if she had not given the note. The estate of A. R. Swaim is insolvent, and so is the defendant. The transaction in question, as was said in *Paxson v. Neilds, supra* (187 Pa. St., 385, 21 A. S. R., 888), is 'a one-sided affair, and exclusively for the benefit' of the plaintiff."

Trust Co. v. Black, 198 N. C., at p. 221: "The note does not recite a special consideration; it was given 'for value received' and was 'secured by a deed of trust on real estate.' The makers were primarily liable jointly and severally. C. S., 458, 3041, 3166; *Roberson v. Spain,* 173 N. C., 23. The unity of person is an incident of the estate created by the conveyance to Black and his wife; it is not incident to the note."

The defendants are married women and *sui juris,* under our statute, and can contract as if unmarried, with certain exceptions. Having signed the negotiable note, they were joint makers and are deemed to be primarily liable thereon, and in an action on the note the burden is on the defendants to allege and prove any matter in release.

In *Royal v. Southerland,* 168 N. C., at p. 406-7, it is written: "By the enactment of the Martin Act, conferring the capacity to contract on married women as if they were *femes sole,* when she signs and delivers a note, though it may be as surety, in reference to the creditor or holder the obligation is hers and not his, and the constitutional provision referred to has no application. It was further contended that his Honor committed error in excluding testimony tending to show certain representations on the part of the husband to the wife as to the effect of putting her signature on the note, but there is no claim or suggestion that these representations were made known to the payee of the note or that he had any part in them. The note is under seal and given for valuable consideration, and, under the circumstances appearing, the representations to the wife by the husband may not be allowed to affect the creditor. Again, it is insisted that error was committed in not allowing the *feme* defendant to testify that in signing the note and mortgage to secure the same she only intended to pledge her land for the debt, and did not intend to come under any further obligation; but this would be in express contradiction of her written note, and it is well understood that when the entire agreement is in writing and the language is clear and meaning plain, the same may not be contradicted or varied by parol. In such case, and in the language of the *Chief Justice* in *Walker v. Venters,* 148 N. C., 388, 'The written word abides.' *Deering v. Boyles,* 8 Kans., 529." *Tice v. Hicks,* 191 N. C., 609.

In *Estes v. Rash,* 170 N. C., at p. 342, speaking to the subject, it is said: "We assume, that the defense to the action which is set up by the *feme* defendant indicated that she intended to show, by parol evidence, that she signed the mortgage on the land of her husband for the purpose of releasing any marital interest she had in the same and not for the purpose of becoming bound for the debt, and, as this varied and contradicted the written contract, it could not be done (*Royal v. Southerland,* 168 N. C., 405), but the *feme* defendant should have proceeded beforehand by an action to have the instrument which evidenced a promise to pay the debt corrected or reformed so as to express the true intention of the parties, if it had been otherwise written by their mistake, or by her mistake, induced by the fraud of the other party."

In *Wilson v. Vreeland,* 176 N. C., at p. 506, we find: "Both Dockery and his wife were liable to the bank and Mr. Long, the accommodation endorser, for all the debt; but as between themselves they were severally liable for one-half. He was not legally bound to his wife for the payment of her half, though he was so bound to the creditors."

For the reasons given, the judgment of the court below is

Reversed.

CHARLOTTE I. THOMPSON v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 2 July, 1930.)

1. **Principal and Agent C b—Where act of agent is beyond real and apparent authority the principal is not bound thereby.**

   Where the act of an agent is beyond the actual and apparent scope of his authority, the principal is not bound or liable to third persons therefor, and the principle that where one of two innocent persons must suffer for the wrong of another, the one who first reposes confidence in the wrongdoer must suffer the loss does not apply in such cases, nor will the principal be bound as in case of a secret limitation in the absence of some act in ratification or knowingly receiving the benefits of the contract.

2. **Same—Where party knowingly deals with agent of limited authority he must inquire into extent of agent's powers.**

   A person who deals with an agent whose authority is known by him to be limited must inquire as to the extent of the agent's authority if he would hold the principal liable for the act of the agent.

3. **Insurance C b—In this case held: soliciting agent did not have apparent authority to collect money in excess of first premium and insurer was not liable therefor.**

   A soliciting agent of an insurance company is without actual authority to receive for the insurer any money except for the first annual premium, and where a person knowing that such agent is solely a soliciting agent, pays to such agent several annual premiums upon his representations of increased benefits, and obtains a receipt on the company's form from the agent which recites that the sum was for the first annual premium, and the insured knew that the sum paid by her was in excess of the first annual premium: *Held*, the insured was put on notice that the agent had authority to receive only the first annual premium, and by the exercise of due care would have ascertained the limited authority of the agent, and the act of the agent in receiving several annual premiums was beyond the real or apparent scope of his authority, and upon the agent's failure to turn in the application for the policy and the money to the company, and its failure to issue the policy, the plaintiff can recover only the amount of the first annual premium from the company.

4. **Same—Insurance agent is authorized to receive only money in payment of premiums.**

   An agent of an insurance company having authority to collect premiums for the company cannot accept anything but money therefor, but this principle does not apply to the facts of this case where the agent was without actual or apparent authority to collect any amount in excess of the first annual premium, and the bonds collected by him were in payment of subsequent premiums.

CLARKSON, J., dissenting; STACY, C. J., concurs in dissent.

APPEAL by plaintiff from *Daniels, J.*, at October Special Term, 1929, of HARNETT. Affirmed.

This is an action to recover of defendant the sum of $521.00, paid by plaintiff to O. A. Moran, an agent of defendant.

The action was heard on a statement of facts agreed which is as follows:

"1. That on 8 March, 1928, and for some years prior and for some time thereafter, O. A. Moran was the duly authorized agent of the defendant for the purpose of representing the defendant in the solicitation of applications for policies, both on the lives of applicants and what was known as retirement annuity policies in the territory including and surrounding the town of Faison, in the county of Duplin, North Carolina, the territory in which he was such agent included the towns of Goldsboro, Mount Olive, and other towns.

2. That the said O. A. Moran was in good standing with the company and regarded as a good agent.

3. That among the duties conferred by the defendant upon their said agent was to represent to the proposed applicants the kind of policies issued by the defendant company, the expense of such policies to the proposed applicants and the benefits to be derived by the assured with respect to each class of policies issued by the defendant society.

4. That on 8 March, 1928, the said O. A. Moran, as agent of the defendant society solicited the plaintiff to accept a policy of the defendant known as retirement annuity policy, explaining to her as hereinafter set forth, the price and benefits to be derived from said policy, and procured an application from said plaintiff in writing for such policy and collected from the plaintiff simultaneously with the signing of said policy as premium on the policy to be issued, the sum of $121.00 in cash and four Liberty Bonds of $100 each, all of the value of $521.00. That said application was never turned in to the defendant and the said defendant knew nothing of the transaction until informed by letter from the plaintiff dated 7 March, 1929, which said letter is copied in the answer, and made a part of this agreed statement.

5. That the defendant's said agent, O. A. Moran, represented to the plaintiff in connection with said application that the benefits among others to be derived from the policy that he was offering to sell her, and for which he represented to her that he was making application was analogous to a savings account; that the more she put into the policy at present, the larger would be the annuity which the defendant society would pay to her; and that she could pay the premiums quarterly, semiannually or for as many years in advance as she desired; that the larger the initial payment, the larger in proportion would be the annuity or dividend payable to her by the company; that the defendant society

was one of the largest insurance companies in the world, and was as solvent and trustworthy as the United States Government, and induced her to pay said large sum in advance, which he fraudulently converted to his own use and never sent any application whatever to the defendant society and no policy has been issued by said society to the plaintiff.

6. That upon the plaintiff paying the defendant's said agent the sum of $521.00 in the manner before set out, the defendant's said agent delivered to her an official receipt on form furnished by the defendant society in words and figures as follows:

'No. A-233429.

'Received of Mrs. Charlotte Ireland Thompson five hundred twenty-one and no/100 dollars, the first annual premium on proposed retirement-annuity on the life of Mrs. Charlotte Ireland Thompson, for which an application bearing a corresponding number as above is this day made to the Equitable Life Assurance Society of the United States. This retirement-annuity policy, subject to the terms and conditions thereof, shall take effect as of the date of this receipt, provided the person upon whose life the annuity depends is on this date in the opinion of the society's authorized officers in New York an acceptable risk and the application is otherwise acceptable on the plan and for the amount and at the rate of premium applied for; otherwise the payment evidenced by this receipt shall be returned on demand and the surrender of this receipt.

Dated at Faison, N. C., 8 March, 1928.

O. A. MORAN, Agent.

This receipt must not be detached unless first premium is collected.'

7. That on 6 July, 1928, O. A. Moran, agent of the defendant, informed plaintiff that he had obtained a receipt from the United States Government for said bonds, and that at the maturity of said bonds in September, 1928, the bonds would be paid, and that in the meantime the plaintiff was accumulating interest at the rate of 4¾ with the defendant society, and that the said agent had been transferred to the Wilmington office and would not be in the Faison section until the fall of 1928, and that he would call upon the plaintiff during the fall of 1928.

8. That on 7 March, 1929, the plaintiff having been informed by H. T. Ray, a school teacher residing in Faison, N. C., that he was unable to obtain a similar policy applied for by him through the said agent, O. A. Moran, he advised the plaintiff to write C. C. Hazzell, manager of the society at Raleigh, N. C.

9. That on 7 March, 1929, and again on 14 March, 1929, the plaintiff informed the manager of the defendant society at Raleigh, N. C., of the payment of $521 to the said O. A. Moran, agent.

10. That on 16 March, 1929, the plaintiff in person delivered the said official receipt to said defendant's manager at Raleigh for the purpose of inspection.

11. That prior to the dates herein alleged the defendant had constituted O. A. Moran its agent under a written contract, the original of which or a copy thereof will be furnished to the court by the defendant. That the following is section 8 of the said contract:

'8. The agent is not authorized to make, alter or discharge contracts for the society, or waive forfeitures, grant permits, name special rates, guarantee dividends, or bind the society in any way, and is not under any circumstances authorized to receipt for deferred or renewal premiums, or to make any endorsement on the policies of the society; and his powers shall extend no further than as herein expressly stated; the agent shall not receive any moneys due or to become due to the society, unless authorized in writing.'

12. That the plaintiff had no knowledge of the contents of said written contract, nor of any specific limitation upon the agency of said O. A. Moran until after this action had been instituted and she was so advised by the answer filed by the defendant therein.

13. That the territory in which O. A. Moran was authorized to act as agent for the defendant included the town of Faison in which the plaintiff resided, and said agent was authorized by the defendant to accept at the time of taking an application the initial premium for the policy applied for and to give a receipt on an official form furnished him by the defendant, said form being as set forth in paragraph 6 hereof.

14. That the defendant, prior to the institution of this action, tendered to the plaintiff the sum of $105 representing the amount of the first premium that would have been due on said policy and being the only amount that the said agent Moran would have had authority to collect as premium on the policy applied for by the plaintiff, under his agency contract.

It is further agreed that this cause may be heard before Honorable Frank A. Daniels, resident judge of the Fourth Judicial District, either in or out of the district."

Upon the foregoing statement of facts agreed, judgment was rendered as follows:

"This cause coming on to be heard before Hon. F. A. Daniels, resident judge of the Fourth Judicial District, by consent of the parties, and upon an agreed statement of facts; and the court finding that agent O. A. Moran collected of the plaintiff the sum of $521.00, of which $105 was the first premium on the policy applied to said agent for by the plaintiff, and the court being of the opinion that the agent could legally collect only the amount of the first premium under the agency contract set out in the case agreed:

Now, therefore, it is ordered and adjudged that the plaintiff recover of the defendant the sum of $105, which was tendered to the plaintiff by the defendant, and being the amount of the first premium, and that the plaintiff pay the costs of this action.

F. A. DANIELS, *Judge, etc.*

This 1 February, 1930."

From this judgment, plaintiff appealed to the Supreme Court.

Clifford & Williams for plaintiff.
S. Brown Shepherd for defendant.

CONNOR, J. At the trial of this action in the Superior Court, it was agreed by the parties that O. A. Moran, as the agent of the defendant, was duly authorized to solicit applications, to be submitted by him to the defendant, for policies of insurance on the lives of the applicants, and also for "Retirement Annuity Policies." It is not contended that he had authority to issue policies in the name of the defendant, or to bind the defendant by contracts with respect to the same. He was required to submit all applications for policies procured by him to the defendant at its home office in the city of New York, for acceptance or rejection by the duly authorized officers of the defendant. He was, therefore, not a general agent of the defendant; he was merely a soliciting agent, with such powers as are ordinarily incident to such an agency. He had no authority to receive money in payment of premiums for policies which had been issued by the defendant. He was authorized to receive and remit to the defendant money in payment only of the first annual premium on a policy applied for.

In 32 C. J., at page 1067, it is said: "A soliciting agent is merely a special agent, and as a general rule, has authority only to solicit insurance, submit applications therefor to the company, and perform such acts as are incident to that power. He may bind the company by agreements and representations properly made in connection with the application for the insurance, but ordinarily has no authority to bind it by attempted acts or contracts in its behalf, relating, not to the taking of the application, but to the subsequent contract of insurance, or to other matters not connected with the application and not within the real or apparent scope of his authority." In the instant case, it is agreed that the agent of the defendant to whom the plaintiff paid the sum of $521.00 as premiums for the policy applied for, had no actual or real authority to receive for the defendant any money except for the first annual premium. It is agreed that the first annual premium was $105.00.

All the money paid by the plaintiff to defendant's agent in excess of this sum, was received by such agent without actual or real authority from the defendant. Defendant is, therefore, not liable for such excess, and was not bound by any act of its agent with respect thereto, unless its agent had apparent authority to receive such sum, and to bind the defendant by a contract with respect to said sum.

When plaintiff was solicited by O. A. Moran for an application to the defendant for a policy of insurance, she knew that the said O. A. Moran was merely a soliciting agent of the defendant—that is, an agent with limited authority from his principal. It is well settled as a principle of the law of principal and agent that an agent with limited authority cannot bind his principal by an act which is beyond the scope, actual or apparent, of the authority conferred upon him by his principal. In *Robinson v. Brotherhood of Locomotive Firemen and Engineers,* 170 N. C., 545, 87 S. E., 537, it is said: "We see no reason why, in a case of limited or restricted agency, the general doctrine applicable should not prevail, to the effect that one who deals with an agent of that kind, having notice of restrictions put upon his power, is bound by such limitations and may not insist on a contract which he knows is in excess of the power conferred." The principal is not bound by or liable for the act of his agent which is beyond the actual, and not within the apparent scope of the agent's authority. It is therefore held that a person who deals with an agent whose authority is known by him to be limited, must inquire as to the extent of the agent's authority, if he would hold the principal liable for the act of the agent. *Swindell v. Latham,* 145 N. C., 144, 58 S. E., 1010. Where the act of the agent, although beyond the actual scope of his authority, is within its apparent scope, and the person dealing with the agent acts in good faith, and with reasonable prudence, the principal is bound. "The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person, who in order to avail himself of rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by the acts of the agent performed in the usual and customary mode of doing business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority. An agent cannot, however, enlarge the actual authority by his own acts without some measure of assent or acquiescence on the part of his principal, whose rights and liabilities as to third persons are not affected by any apparent authority which his agent has conferred upon himself simply by his own representations, express or implied. Although these rules are firmly established, their application to particular cases is extremely difficult. The liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had under the circumstances conferred upon his agent." *R. R. v. Smitherman,* 178 N. C., 595, 101 S. E., 208. In *Graham v. Insurance Co.,* 176 N. C., 313, 97 S. E., 6, the plaintiff having failed to show any authority from the company to its soliciting agent, to whom she had given her application for the policy issued by the company, to bind the company by her act, a judgment of nonsuit was affirmed. *Brown, J.,* in his opinion in that case, quotes with approval the principle stated by *Ruffin, J.,* in *Biggs v. Insurance Co.,* 88 N. C., 141, as follows: "Where one deals with an agent it behooves him to ascertain correctly the extent of his authority and power to contract. Under any other rule, every principal would be at the mercy of his agent, however carefully he might limit his authority. It is true the power and authority of an agent may always be safely judged of by the nature of his business, and will be deemed to be at least equal to the scope of his duties." See *Foscue v. Insurance Co.,* 196 N. C., 139, 144 S. E., 689.

In the instant case, at the time she signed the application for a policy of insurance, upon the solicitation of defendant's agent, and paid to said agent the sum of $521.00, upon his representation that he had authority to receive the said sum, and to bind the defendant to return the same if the policy was not issued, plaintiff knew that the annual premium for said policy was $105.00, and that the sum paid by her to the said agent was in excess of the said sum; the official receipt for the sum paid by her to said agent recites that said sum of $521.00 was "the first annual premium on the proposed Retirement Annuity policy" on her life, and that said receipt should not be detached "unless the first premium is collected." Plaintiff was thus put on notice that the agent had authority to receive only the first annual premium, which she knew was $105.00. Had she exercised reasonable prudence and due care she would have ascertained that the agent had no authority to receive money from an applicant for a policy of insurance to be issued by the defendant in excess of the first annual premium. Upon the facts agreed in the instant case, the act of the agent was not only beyond the scope of his actual authority; it was not within its apparent scope. We are therefore of opinion that there was no error in the judgment that plaintiff recover of the defendant only the sum of $105.00, the sum which the agent had authority to receive from her at the time she delivered to him her application.

While the instant case is differentiated in some respects, upon the facts, from *Lauze v. New York Life Ins. Co.* (N. H.), 68 Atl., 31, cited and relied upon by defendant, the judgment herein is in accord with the principles on which that case was decided. In that case, it was held that the apparent scope of the authority conferred by the company on the agent did not extend beyond soliciting, negotiating and delivering the contract. It was held that the agent had no authority, actual or apparent, to receive from the insured money in payment of a premium which became due after the issuance of the policy, notwithstanding the provisions of a statute in force in New Hampshire, identical with C. S., 6304. The statute by its terms applies only to the agent who negotiates the contract, and is limited in its application to the first or initial premium. In the absence of express authority from the company, the agent who solicited the application has no power to bind the company by the receipt of money in payment of premiums which become due after the issuance of the policy. Such agent has power, under the statute to receive only the first premium which brings the policy into force, when the application is accepted by the duly authorized officers of the company.

It is said that this is a hard case. So it is. The plaintiff cannot, we think upon the facts agreed, invoke the equitable principle that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss. In proper cases, this principle is often applied by the courts, but we find nothing in the facts agreed in this case, which calls for its application.

We have not overlooked the fact in this case that plaintiff made the payment to defendant's agent partly in money and partly in Liberty Bonds. It is well settled that an agent for an insurance company, authorized to receive money in its behalf in payment of premiums, has no authority to receive anything except money, and that the company is not bound by a payment made otherwise than in money. This principle has no application in the instant case, however, as the judgment is that plaintiff recover of defendant a sum less than the money received by the agent. Plaintiff was denied recovery of any sum on account of the Liberty Bonds.

We find no error in the judgment. It is

Affirmed.

CLARKSON, J., dissenting: This is not an action between a principal and agent where the scope of the agent's authority is the authority actually conferred upon him by the principal, but this is an action by a third party and a different principle is applicable. Confusion has arisen in the decisions on the subject when the distinction is not kept in mind.

The principles applicable to the facts in this action are set forth in *R. R. v. Smitherman,* 178 N. C., at p. 598-9, as follows: "While as between the *principal and agent* the scope of the latter's authority *is that authority which is actually conferred upon him by his principal,* which may be limited by *secret instructions and restrictions,* such instructions and restrictions do not affect third persons ignorant thereof, and *as between the principal and third persons* the mutual rights and liabilities *are governed by* the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. *The apparent authority, so far as third persons are concerned, is the real authority,* and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person, who, in order to avail himself of rights thereunder, *must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence,* in which case the principal will be bound by the acts of the agent performed in the usual and customary mode of doing such business, *although he may have acted in violation of private instruction, for such acts are within the apparent scope of his authority."* (Italics mine.) *Bank v. Hay,* 143 N. C., 326; *Trollinger v. Fleer,* 157 N. C., 81; *Powell v. Lumber Co.,* 168 N. C., 632; *Furniture Co. v. Bussell,* 171 N. C., 474; *Cardwell v. Garrison,* 179 N. C., 476; *Bobbitt Co. v. Land Co.,* 191 N. C., 323; *Sears, Roebuck & Co. v. Banking Co.,* 191 N. C., 500; *Bank v. Sklut,* 198 N. C., 589.

Page, in his valuable work on Contracts, Vol. 3, 2d ed., part sec. 1760, at p. 3018, states the matter thus: "Outside of the class of public agents the actual authority conferred by a principal *upon his agent is practically inaccessible to the public at large.* Accordingly, persons who do not know what the *agent's authority really is, are justified in dealing with him upon the assumption that he has the authority which the principal indicates by his conduct that the agent possesses.* Thus dealing with the agent, such persons may hold the principal on contracts *outside the real authority of the agent but inside his apparent authority."* (Italics mine.)

C. S., 6304, is as follows: "An insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker knowingly procuring by fraudulent representations payment, or the obligation for the payment, of a premium of insurance, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or be imprisoned for not more than one year." This salutary statute says *premium,* it does not limit it to the *first premium* as defendant contends the *secret contract* with its agent does.

The findings of fact by the court below, agreed upon by the parties, are to the effect: That one O. A. Moran was the duly authorized agent of defendant on 8 March, 1928, and for some years prior and some time thereafter, and his territory as such agent included the town of Goldsboro, Mount Olive and other towns. Among the duties conferred by the defendant upon its said agent was to represent to the proposed applicants the kind of policies issued by the defendant company, the expense of such policies to the proposed applicants and the benefits to be derived by the assured with respect to each class of policies issued by the defendant society. That on 8 March, 1928, the said O. A. Moran, as agent of the defendant society solicited the plaintiff, who lived in the agent's territory, to accept a policy of the defendant known as retirement annuity policy, explaining to her the price and benefits to be derived from said policy, and procured an application from said plaintiff in writing for such policy and collected from the plaintiff simultaneously with the signing of said application, as premium on the policy to be issued, the sum of $121 in cash and four Liberty Bonds of $100 each, all of the value of $521. That said application was never turned in to the defendant and the said defendant knew nothing of the transaction until informed by letter from the plaintiff dated 7 March, 1929.

The defendant company, the principal and Moran his agent, had a *secret agreement,* as above set forth, unknown to plaintiff, that the agent "is not under any circumstances authorized to receipt for deferred or renewal premiums." At the time he had this *secret agreement* with defendant he had been for years an agent for defendant selling insurance in Goldsboro, Mt. Olive and other towns. He had authority to represent to the applicant for insurance the kind of policies issued, the expense of such policies, the benefit to be derived by the assured with respect to each class of policies issued by defendant company. He had an official receipt, the one in the present case, No. A 233429 furnished him by the defendant company. On this receipt, furnished him by the company, he receipted her for $521.

Under all this indicia of apparent authority he, as agent of defendant company for long years in that locality, solicited the plaintiff to accept a policy known as a retirement-annuity policy and collected at the time as premium on the policy to be issued the sum of $121 in cash and four Liberty Bonds of $100 each, all of the value of $521. The other representations made to plaintiff to obtain this money I need not repeat—they are set forth above. At the time he collected this $521, defendant had this *secret agreement with its agent,* unknown to plaintiff, that its agent had authority only to collect the amount of the first premium, $105. These representations were made at the time to procure the contract, and it is unthinkable that defendant, having given his agent all the apparent authority can now claim it is not liable for its agent's representations by setting up a *secret agreement.* This Court may rely on an opinion of the New Hampshire Court, but, speaking for myself, such law is foreign to all sense of justice. With all the indicia of authority to obtain plaintiff's money, which she paid in good faith, and now defendant refuses to return it on a *secret agreement unknown to plaintiff* is putting a premium on *secret dealings,* which is abhorred in business methods and frowned on by law.

It is well settled in this jurisdiction: "Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss." *R. R. v. Kitchen,* 91 N. C., at p. 44; *Bank v. Liles,* 197 N. C., at p. 418.

The defendant held this agent out for years with all the authority to solicit certain kinds of insurance for it, with the official receipt on forms furnished by the defendant, with official numbers on them. The receipt given shows *no secret agreement* between defendant and its agent. The agent made enticing and alluring representations of what his company was giving her; she relied on this agent's apparent authority, in good faith, and defendant's agent obtained from her five premiums on the policy that he had a right to solicit, amounting to $521. Now the defendant company contends that it had with its agent a *secret agreement,* unknown to plaintiff, and refuses to either give her the insurance purchased or return the $521. Such conduct on the part of defendant should not be upheld by this Court. It puts the general public at the mercy of agents sent out to solicit insurance with all the paraphernalia of authority, but limited by a *secret agreement,* unknown to the unsuspecting public. The facts in this case disclose that plaintiff has been cheated and defrauded by an agent of the defendant company, for years in its service, who had the power to solicit insurance with all the indicia of authority. The agent representing he had authority to take plaintiff's hard earned money, part in Liberty Bonds, saved no doubt by her for a "rainy day," converting from the agent's representations the Liberty Bonds into a better insurance investment. The agent has gotten plaintiff's money from her by his apparent authority, and a *secret agree-*

ment between the principal and agent should not be allowed to defeat this recovery. Such secret conduct in a case of this kind should not be tolerated by this Court, whatever the New Hampshire Court may hold. That decision is only persuasive, if that, in this Court. Such *secret agreement* between the principal and agent cannot prevail against the apparent authority of the agent which was relied on by plaintiff in good faith. The main opinion, to my mind, is contrary to the weight of authority in the nation and settled law in this jurisdiction. I can see no reason why defendant, an insurance company, is not bound by the settled law in cases of this kind that apply to others. It is a matter of common knowledge that companies like defendant require bonds from their agents, to protect them, when the agents are sent out to solicit insurance from the general public.

In *Bank v. Winder,* 198 N. C., p. 18, the matter has recently been thoroughly discussed in reference to ownership of personal property, and by analogy is controlling. It is there said, p. 21, citing a wealth of authorities: "But an estoppel will arise against the real owner when he clothes the person assuming to dispose of the property with the apparent title to it, and the person setting up the estoppel, relying upon the fact, parts with something of value or extends credit on the faith of such apparent ownership. 10 R. C. L., 777, sec. 91. The controlling principle is this: Where the owner of personal property clothes another with the indicia of title, or allows him to appear as the owner, or as having the power of disposition, an innocent third party dealing with the apparent owner will be protected."

In Couch Cyc. of Ins. Law, Vol. 2 (1929), p. 1479-80, and part of section 517, is in full accord with the decisions of this and other courts on the subject. We find: "It is within the power of an insurance company, as between itself and its agent, to define and limit the powers of the latter, but it is equally well settled that the rights of innocent third parties dealing with an agent, within the apparent scope of his authority, cannot be affected by private instructions to such agent, of which they have no notice or knowledge, or by secret limitations upon his authority. In fact, it is clear that insurance companies are responsible for the acts of their agents within the general scope of their business intrusted to their care, and that no limitations of their authority will be binding on parties with whom they deal, which are not brought to the knowledge of those parties, especially where such persons rely in good faith upon his apparent authority. Undoubtedly, if an officer of an insurance company assumes to possess certain powers, and the nature of his employment justifies the assumption of authority, and the party dealing with him has no notice of want of the claimed authority, and there is nothing to warrant an inference to the contrary, the company is bound, even though he had no such power as claimed. And it would seem to be especially true, as it has been held, that limitations upon the powers of, or secret instructions to, a general agent, do not bind third persons dealing with him without notice thereof; also, that it is no defense that the general agent departed from private instructions when acting within the general scope of his authority, unless such instructions be made public, or the insured has notice, or unless the party dealing with the agent is, by reason of the attendant circumstances, or something in the nature of the business, or by custom, or by a course of dealing, or otherwise, put upon inquiry as to the exact limits of the agent's authority. . . . (p. 1482). With respect to private restrictions as affecting the powers or authority, express or implied, of subagents, it is held, in application of the principle, that neither corporations nor individuals can escape their honest liabilities by secret understandings between principals and agents; that if a person is employed as agent of a life insurance company, but, by a secret contract between him and the company's general agent, he is to be simply a subagent, and he is held out as agent of the company, with the power to collect and pay over premiums to its general agent, the company must answer for collections made by him, but not turned over to it," etc.

There is nothing to indicate in the findings of fact that plaintiff knew or in the exercise of due care might have known that defendant's agent did not have authority to receipt for her $521.

In fact, the twelfth finding shows to the contrary: "That the plaintiff had no knowledge of the contents of said written contract, nor of any specific limitation upon the agency of said O. A. Moran until after this answer filed by the defendant therein."

This finding is inadvertently overlooked in the main opinion. The agent of defendant took $121 in cash and four Liberty Bonds, the equivalent about which no question is raised, and gave the receipt for $521 cash, and in the receipt called it "the first annual premium on proposed retirement annuity," etc. Defendant's agent deceived plaintiff, and by the receipt called it the first annual premium, and should be the loser. How did plaintiff know that defendant's agent only had the right to take money—he took the equivalent as money and receipted her for $521. Then again, the receipt says "This receipt must not be detached unless first premium is collected"—that is exactly what was done, the first premium and more was collected.

I am authorized to say that the *Chief Justice* concurs in this dissent.

T. W. MEWBORN ET AL. v. CITY OF KINSTON ET AL.

(Filed 2 July, 1930.)

1. **Municipal Corporations K c—Where clerk erroneously places sum in sinking fund, city may correct the error and otherwise apply it.**

   While sinking funds provided for the retirement of municipal bonds may not be diverted from that purpose to other municipal requirements by a city, Constitution, Art. II, sec. 30, C. S., 2969(s), a sum erroneously placed on the books of the city in a sinking fund by a clerk without authorization, which sum was actually derived from profits from the municipal electric plant, does not fall within the constitutional or statutory inhibitions, and the city may by ordinance correct the error of the clerk and use the funds for other lawful municipal purposes.

2. **Municipal Corporations B d—In this case held: submission to voters of question of enlarging city electric plant was not necessary.**

   Where a city has acquired for municipal purposes an electric power and light plant after submitting the question to its voters according to the provisions of its charter, the corresponding authority is implied, nothing else appearing, to maintain the plant in such a reasonable manner as might be necessary to guarantee at all times efficiency of service and the protection of the citizens and property of the community, and the question of an enlargement of the plant to meet these requirements to be paid for out of the profits of the plant, is not necessary to be likewise submitted to the voters of the city, the provision of the charter requiring the submission to the voters referring only to the initial acquisition of the plant. As to whether the charter could limit the vote to the "qualified taxpaying voters," *quære?*

3. **Same—In this case supply of current to outside consumers did not affect question of necessity of enlarging city power plant.**

   Where a city sells current to consumers outside the city and the amount of current so distributed is so small that it does not affect the necessity of enlarging the city power plant in order to furnish efficient service to its own citizens, the question of the city's power to sell the current to outside consumers has no determinative bearing on the question of the city's authority to enlarge the power plant.

4. **Appeal and Error J a—Supreme Court may review facts in injunctive proceedings but burden is on appellant to show error.**

   The Supreme Court on appeal in injunctive proceedings may review the evidence upon which the judge of the Superior Court found the facts upon which judgment was entered, but the burden is on the appellant to rebut the correctness of the facts so found by showing error upon assignments thereof.

CIVIL ACTION, before *Midyette, J.*, at Chambers. From LENOIR.

The plaintiff instituted an action in behalf of himself and other taxpayers of the city of Kinston against the city of Kinston, the mayor, chairman of water and light committee, the city clerk, and the superintendent of the water and light department of said city, alleging that the said municipality owns and operates its electric light plant and water supply system and is about to expend more than $100,000 for installation of an additional unit for said plant for the purpose of supplying electric current to customers outside the city. It is further alleged that the present plant is adequate for supplying the needs of the inhabitants within the city. It was further alleged that the officers of the city had unlawfully diverted from the sinking fund created for the purpose of paying the interest and principal of bonds heretofore issued the sum of $80,000 for the purpose of using the same in constructing an additional unit to the light and power plant.

The defendant filed an answer alleging that the present electric and power plant of the municipality was inadequate to meet the needs of the inhabitants of the city and that enlargement of same was necessary for the protection of life and property of the citizens of said city, and that while a small amount of electricity was furnished to outlying communities that the amount so furnished was negligible so that if such service should be discontinued the hazard of inadequate equipment would still constitute a menace to the inhabitants of the city. It was further alleged in the answer that the said sum of $80,000 was never a part of the sinking fund of the city, but was placed therein by the city clerk improperly for the convenience of bookkeeping.

A preliminary injunction was issued and the cause was heard on 27 February, 1930.

The judgment contains all facts essential to the determination of the questions of law involved and said judgment is as follows:

"The above entitled civil action coming on to be heard on this 27 February, 1930, the return day named in the temporary restraining order, both plaintiffs and defendants being represented, and the court having heard all evidence offered and argument of counsel, from said evidence the court finds the following facts, to wit:

1. That the plaintiff is a resident and taxpayer of the defendant, city of Kinston.

2. The defendant, city of Kinston, is a municipal corporation, in the county of Lenoir; and the other defendants are officers of the city as indicated by their titles and as shown in the complaint.

3. The defendant, city of Kinston, owns and operates its electric light and power plant; the electric generating equipment consisting of one 1500 K. W. turbo-generator and two 300 K. W. generator and engines.

4. The city of Kinston at various times and under various acts of the General Assembly, both private and public, has issued various bonds maturing at different dates. The affidavit of W. B. Coleman herein filed contains a true and correct schedule of the bonded indebtedness of

the city of Kinston as of 31 May, 1929, and the statutes under which the said bonds are issued. As explained in said affidavit, some of the bonds have been paid off and discharged since 31 May, 1929, the date upon which the said schedule was made up, being all the bonds maturing since that date.

5. On 1 June, 1928, there was in the hands of the treasurer of the city of Kinston the sum of $52,993.52, being the proceeds collected from taxes levied to create a sinking fund for the retirement of bonds; on 1 June, 1928, there was in the hands of the treasurer of the city of Kinston the sum of $5,031.29, being taxes collected and special assessments paid pursuant to chapter 202 of the Private Acts of 1913; on 1 June, 1928, there was in the hands of the treasurer of the city of Kinston the sum of $4,021.28, being taxes collected and special assessments paid pursuant to chapter 56 of the Public Laws of 1915; on 1 June, 1928, there was in the hands of the treasurer of the city of Kinston the sum of $5,595.78, being taxes collected and special assessments paid pursuant to chapter 56, Public Laws of 1915, and carried in account number 2. The said sums, aggregating $67,641.87, were collected from taxes and special assessments for sinking fund purposes to retire the bonded indebtedness of the city of Kinston.

6. On 1 June, 1928, there was in the hands of the treasurer of the city of Kinston the sum of $126,699.03, profits accumulated from the operation of the electric light and water system of the city of Kinston.

7. The board of aldermen of the city of Kinston held a regular meeting on 2 July, 1928. Among other business attended to was business relating to the sinking fund and the following appears from the minutes thereof:

"City clerk reports the financial condition showing a sinking fund in excess of water and light sinking fund, also recommends that the city take certificate of deposit in the amount of $120,000, equally divided among the three banks of the city. It was moved and duly seconded that the recommendations be accepted and so ordered." The amount referred to as being "in excess of $194,000" is made up of the amounts herein found to be on hand 1 June, 1928, aggregating $194,340.90.

Acting under the instructions of the board of aldermen, the clerk of the city of Kinston set up upon his books a sinking fund account. Warrants were issued against the amount for $120,000, which warrants were turned over to the various banks of the city of Kinston and certificates of deposit taken therefor. The city of Kinston now holds certificates of deposit representing this amount, which certificates have been issued in renewal of the original certificates. The balance of the said sinking fund account was carried as a cash balance so as to have a fund upon which checks could be issued for the payment of maturing bonds.

9. Since 1 June, 1928, the city of Kinston has collected on account of taxes levied for a sinking fund and special assessments various amounts, and since said date all maturing bonds have been taken care of and paid off either from the money on hand in the sinking fund or from collections made for that purpose, there being now in the hands of the treasurer of the city of Kinston certificates of deposit for $160,000 and cash on hand, on general deposit, of $22,541.37 for sinking fund account.

10. In addition to the $160,000 represented by certificates of deposit and the cash balance of $22,541.37, there is also due the sinking fund for past due paving assessments $14,108.30, and taxes levied for sinking fund purposes, but uncollected, $14,581.88, making the total sinking fund of $211,231.55. That in addition to this amount, there is also in hand $7,732.61 collected pursuant to chapter 202 of the Private Laws of 1913; $4,827.54 collected pursuant to chapter 56 of the Public Laws of 1915, and $3,412.02 collected pursuant to chapter 56 of the Public Laws of 1915, being account number 2, on account of special assessments, to retire outstanding serial bonds.

11. There is in the hands of the treasurer of the city of Kinston, represented by certificates of deposit or cash on account current, and set aside for sinking fund purposes and uncollected paving assessments and uncollected taxes for sinking funds, more than sufficient money with which to pay all bonds of the city of Kinston maturing prior to and including 1 January, 1935, other than certain serial bonds, the payment of which is required to be provided by taxes levied for that purpose and special assessments.

12. The facts in regard to the bonded indebtedness of the city of Kinston, the sinking fund account, how derived and when set apart, are set out in the affidavit of W. B. Coleman herein filed and these findings of fact. The said affidavit of W. B. Coleman is found to be true and correct.

13. That the charter of the city of Kinston contains, among others, the following provisions:

"Sec. 15. Ownership and regulation of public utilities. The right is hereby granted to the city of Kinston to own or to acquire by purchase its public utilities, such as gas, waterworks, electric lights and underground, surface and elevated street railways, subways or underground conduit system for electric light, power and other wires used for the purpose of transmitting any electric service: *Provided,* that no purchase or expenditures shall be made under this section unless the same shall first have been submitted to the vote of the qualified taxpaying voters at an election to be held exclusively for that purpose, and the right is hereby granted to the city of Kinston to regulate all public utilities in said city and to require an efficiency for public service, and to require all persons or corporations to discharge the duties and undertakings for the purpose of which the respective franchises were made."

14. That the charter of the city of Kinston contains, among others, the following provision: "(3) All contracts of whatever character pertaining to public improvements or the maintenance of public property of the city of Kinston involving an outlay of as much as $2,000 shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval, advertisement of proposed work or improvement embraced in said proposed contract shall be made inviting competitive bids for the work proposed to be done, which advertisement shall be published once a week for four weeks in a newspaper published in the city of Kinston."

15. That the charter of the city of Kinston contains, among others, the following provision: "(23) In making up the budget allowance for any current year the city council shall first make provisions for the payment of the interest, the creation, setting aside and preservation of the legal sinking fund upon any or all of the outstanding indebtedness of the city, and, etc."

16. That the charter of the city of Kinston contains, among others, the following provision: "(Sec. 26). Taxation. The city council shall have the power, and it is hereby authorized, to levy annually for general purposes, and for the purpose of paying the interest and providing the sinking fund on the outstanding bonded indebtedness of the city of Kinston and for paying interest and making provisions for the sinking fund on such future bond issues as may be authorized an *ad valorem* tax on real or personal property within the corporate limits of the said city as defined in section 2 of this act, and on all personal property owned by residents of said city, including money on hand, solvent credits, and upon all franchises granted by the city to individuals or corporations and upon all other subjects taxed by the General Assembly a tax of not exceeding one dollar on every one hundred dollars appraised valuation of said property."

17. The board of aldermen of the city of Kinston has never taken any official action setting aside the sum of $80,000 represented by two certificates of deposit introduced in evidence, to the sinking fund account. The said sum of $80,000 was derived from profits of the electric light and water works system, which profits are additional to the profits represented by certificates of deposit for $120,000, which amount was set aside by the board of aldermen on 2 July, 1928. Such book entries as were made which indicate that the said sum of $80,000 was a part of the sinking fund were made by W. B. Coleman as clerk for his own convenience in bookkeeping and were never authorized or ratified by the board of aldermen.

18. On 4 November, 1929, the attention of the board of aldermen was called to this account, whereupon the resolution set out in the third paragraph of the fourth further defense was duly adopted and spread upon the minutes, which resolution is as follows, to wit:

"Resolution to direct the city clerk of the city of Kinston to transfer and separate from the sinking funds account of the city of Kinston the sum of $80,000, derived from operation of the water and light plants and improperly entered by the city clerk to the credit of the sinking fund account to another and proper account.

Whereas, it appears to the city council of the city of Kinston that the clerk is carrying in his general ledger an account under the heading of 'Certificate of deposit for retirement of water and light bonds,' which account is intended to cover and does cover the sinking funds required by law to be held by the city of Kinston for the retirement of water and light bonds, paving assessments and sewerage bonds, and for graded school bonds; and,

Whereas, it further appears to the city council that the amounts of sinking funds which should now be on hand and held by the city of Kinston, as required by law, are as follows:

For water and light bonds, $120,000; for paving assessments and sewerage and graded school bonds, $40,000, and that the said amounts of $120,000 and $40,000 are on hand and held in the form of bank certificates of deposit, and that the said amounts constitute all the sinking funds required by law and by the provisions of any bonds or other engagements of the city of Kinston, and,

Whereas, it appears to the city council that the city clerk of his own motion, and without any direction from the city council or any other official of the city of Kinston, has also entered in said account the additional amount of $80,000, evidenced by bank certificates of deposit, which represent surplus from the operation of the water and light plants, which said amount constitutes no part of the sinking funds required by law, or by the provisions of any bonds or other engagements of the city of Kinston, and,

Whereas, said fund of $80,000 should be transferred and separated from said sinking funds of $120,000 and $40,000 respectively, as above set forth,

Now, therefore, be it, and it is hereby resolved by the city council of the city of Kinston that the city clerk be, and he is hereby directed to transfer the said amount of $80,000 of surplus so derived from the operation of water and light plants of the city, and which constitute no part of the sinking funds of the city, to a new account to be set up by the said city clerk in his general ledger under the heading of 'surplus fund from operation of water and light plants,' or some such similar heading as may be proper, to be held in such account for disbursement when and as may be directed by the city council and according to law."

19. That the proposed enlargement of its plant will cost approximately $125,000.

20. The resolution of 4 November, 1929, is the only official act which the board of aldermen of the city of Kinston has ever taken with reference to the $80,000 in controversy.

That there will accrue and be available for use from the operation of the electric light plant before 1 July, 1930, an amount sufficient, when added to the $80,000 already provided, to make more than the total of $125,000 needed for the proposed enlargement of the electric light plant.

21. The city of Kinston has promptly met all interest due on its bonded indebtedness and all bonds issued by it as they respectively fell due, either by the payment or refunding thereof, and there are now no bonds of the said city past due and unpaid, and no past due and unpaid interest coupons.

22. That the city had in hand, all told, money including certificates of deposit as of 31 January, 1930, date of last trial balance, $297,472.53.

23. That the amount of the bonded indebtedness of the city of Kinston as of 31 May, 1929, was $784,000, on which there has been paid since said date and prior to the institution of this action, the sum of $20,000, leaving the total bonded indebtedness of the said city as of the date of the institution of this action, $764,000.

24. That the question of the purchase and installation of said new electrical unit and equipment, for the enlargement and improvement of its plant, and the question of the expenditure to be made therefor, has not been submitted to the vote of the qualified voters at an election to be held exclusively for that purpose; nor does the defendant city propose to submit the question of purchase and installation of the same to the voters of the defendant city; nor has any referendum been requested or in any way asked.

25. For some years past, the city of Kinston has been furnishing and selling electric current to the residents of the suburbs, much beyond the corporate limits and has furnished street lighting in said suburbs. The city has furnished the wiring to the various residents and street lights, and charges and receives from such suburban residents the same rate as is paid by the resident of the city.

26. The city of Kinston has entered into contracts with and supplies the town of Snow Hill, in Greene County, the town of Grifton, in Pitt County, and the town of Pink Hill, in Lenoir County, by which, in general, the lines owned by the said towns or by other parties are carried to the plant of the city of Kinston, and connected with the

switchboard and electric current is sold to the said towns and measured by meters at the switchboards. These towns or other persons in turn retail the current to the consumers and pay the city of Kinston at contract prices.

27. Under contract, the city of Kinston also furnishes electric current to the Kennedy Farm, owned by the Baptist Orphanage, and also to certain school buildings owned by the county of Lenoir.

28. The amount of electricity furnished to the suburban inhabitants, the towns above mentioned, the orphanage and the county, is inconsiderable compared to the amount consumed by the residents of the city of Kinston. The peak load of the plant is 1,625 kilowatts; the peak load or maximum amount furnished to outside consumers is 245 kilowatts.

If all the electricity furnished to persons outside the corporate limits of the city of Kinston was discontinued, whatever necessity has arisen for the enlargement of the plant would still exist. The furnishing of electricity outside the corporate limits of the city of Kinston has not and does not affect the necessity which may have arisen for the enlargement of the plant.

29. That the maximum supply of power to all the combined territory outside the corporate limits of the city of Kinston which is furnished by the city, is approximately 245 kilowatts, omitting power supply to a gin on one of the lines for a short season during the year.

30. That to discontinue the outside supply mentioned above would not remedy the existing objection and danger as herein set forth in this cause in the affidavits filed for the reason that the maximum load then remaining within the corporate limits would be approximately 1,380 kilowatts, which is more than double the maximum capacity of the city's plant with the 1,500 kilowatts generator or unit out of commission.

31. That on 26 February, 1930, the board of aldermen duly adopted a resolution reading as follows:

"A resolution relating to and providing for the enlargement of the electric light system and plant of the city of Kinston.

Whereas, in the judgment of the council of the city of Kinston the electric light system and plant of the city is inadequate and insufficient for the present needs of the city and its inhabitants, and does not in its present capacity and condition afford reasonable protection and safety to the life and property of the inhabitants of said city; and,

Whereas, the council of said city has heretofore given due consideration to the enlargement of said system and plant, and has taken steps to enlarge the same, and now desires to proceed with all reasonable expedition with the construction of such necessary and proper enlargement;

Now, therefore, be it and it is hereby ordained and resolved by the city council of the city of Kinston, that all steps taken and arrangements made heretofore by the city council and by the officers and agents of said city under the direction of its council be and the same are hereby approved.

Be it and it is hereby further ordained and resolved that the present electric light system and plant of the city of Kinston is in the judgment of the council inadequate and insufficient and does not provide reasonable safety and protection to the life and property of the inhabitants of said city.

Be it and it is hereby ordained and resolved that the officials and agents of said city proceed with arrangements and plans for the enlargement of said system and plant to such standard size and proportion as in their judgment and in the judgment of the city council may be proper, and that the expense and cost of the same be paid from any funds which may have heretofore accrued or which may hereafter accrue from the operation of the said electric light system and plant, and from the water system and plant of said city, and also which may have accrued or may hereafter accrue from any other sources available under the law for such purpose; and that all arrangements and plans for such construction proceed as may be permitted under the law."

32. The court further finds that the facts set out in the affidavits of W. B. Coleman, F. G. Godfrey, R. J. Grantham, Martin Swartz, W. J. McAdams and John E. Meyher filed in this cause are true.

From the foregoing facts, the court arrives at the following conclusions of law:

1. That the sum of $80,000 in controversy is not and never has been a part of the sinking fund of the city of Kinston.

2. That the restraining order heretofore issued herein be and the same is hereby dissolved.

From the foregoing findings of fact and conclusions of law, it is ordered that the restraining order heretofore issued be and it is hereby dissolved.

Signed this 22 March, 1930, both plaintiffs and defendants consenting that this judgment might be signed at the convenience of the presiding judge, wherever he might be."

From the foregoing judgment the plaintiff appealed.

Rouse & Rouse for plaintiff.

H. G. Connor, Jr., Sutton & Greene and Dawson & Jones for defendant.

BROGDEN, J. The record presents the following questions of law:

1. Can a municipal corporation owning an electric light and power system enlarge the same and expend therefor funds derived from the operation thereof?

2. Can a municipal corporation use any part of a sinking fund created by law for the enlargement, maintenance or extension of a municipally owned light and power or water plant?

3. Can a municipal corporation furnish light and power to customers outside the city limits?

C. S., 2787, subsections 3 and 5, empower all municipal corporations "to purchase, conduct, own, lease and acquire public utilities," and "to create, provide for, construct, regulate, and maintain all things in the nature of public works," etc. Furthermore, section 15 of the charter of the city of Kinston expressly authorizes the municipality to purchase an electric light plant and "to regulate all public utilities in said city and to require an efficiency for public service." The power to purchase said utility was contingent upon submitting the question to the "qualified taxpaying voters at an election to be held exclusively for that purpose." The city acquired the plant by the method prescribed by law. It is contended, however, that said section of the city charter forbade an expenditure for the enlargement of a plant so acquired unless the question of enlargement was also submitted to a vote of the "qualified taxpaying voters," etc. In the first place, it is to be doubted whether the provision submitting the question to "qualified taxpaying voters" is a valid provision. Certainly it would seem to be an innovation to exclude from participation in public elections all those who are not taxpayers although they might be otherwise qualified to vote. However this may be, the proviso in the charter requiring the question to be submitted to popular vote, as we interpret it, refers to the initial acquisition of the property. Ordinarily the power to acquire property, nothing else appearing, would imply a corresponding power to maintain the property in such a reasonable manner as might be necessary to guarantee at all times efficiency of service and the protection of the citizens of the community.

In the case at bar it appears from the record that the board of aldermen found as a fact that the plant in its present condition was inadequate and insufficient for the present needs of the city and its inhabitants.

The trial judge also finds that the facts stated in certain specified affidavits are true. These affidavits are to the effect that the present plant must be enlarged in order to meet the reasonable needs of the city and to protect the property rights of the inhabitants thereof.

Under these circumstances we are of the opinion that the city has the power to enlarge the plant without submitting the question of enlargement to popular vote. The case of *Robinson v. Goldsboro,* 135 N. C., 382, 47 S. E., 462, is not at variance with this conclusion. In that case authority was given the board of aldermen to "issue bonds from time to time" not to exceed, however, $200,000. A portion of the total was issued and thereafter the city undertook to increase the capacity of the plant without submitting the question to a vote of the people. Clearly the Legislature had prescribed the mode upon which $200,000 should be issued and the power so delegated had not been exhausted. The Court remarked: "Certainly, until this power is exhausted, it excludes any other." In the present case, so far as the record discloses, the original power was exhausted and the original mode of acquiring the light plant strictly complied with.

Assuming that the city has the power to enlarge the plant, under the circumstances disclosed in the record, it clearly appears that the funds for such enlargement are not to be derived from pledging the faith or credit of the municipality, but from the proceeds of the operation of the plant itself. The right of a city to use funds on hand for a public purpose is fully sustained by the decisions of this Court. *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611; *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624; *Nash v. Monroe,* 198 N. C., 306.

We are therefore of the opinion that the first question of law raised by the record must be answered in the affirmative.

The second question of law rests upon the express provision of Article II, section 30, of the Constitution of North Carolina which established the inviolability of sinking funds provided for the retirement of bonds. The constitutional provision is further enforced by C. S., 2969(s), which provides in substance that any member of a board or any disbursing officer who shall knowingly vote for the diversion of a sinking fund raised by taxation shall be guilty of a felony. Therefore, the second question of law raised by the record must be answered in the negative. However, the trial judge finds as a fact that the $80,000 which the city proposes to use in enlarging the light plant was derived from profits from the operation of said plant and was placed in the sinking fund by the city clerk without authority from the board of aldermen and for his own convenience in keeping the record of municipal accounts. Therefore, it is clear that, upon the findings of fact made by the trial judge, the $80,000 was never a part of the sinking fund of the city of Kinston because a sinking fund is the creature of law and not the creature of a bookkeeper. Hence it was entirely proper for the city to make its records speak the truth and to segregate this fund from the general sinking fund provided by law. It was further found that the entire cost of enlarging the plant was to be paid solely and exclusively from revenue produced by the plant, and that no part of the cost of such improvement was to be raised by taxation.

The third question of law has been answered in the affirmative in the case of *Holmes v. Fayetteville, supra.* Assuming, however, that the third question should be answered in the negative, the record discloses, and the judge finds as a fact that "the furnishing of electricity, outside the corporate limits of the city of Kinston, has not and does not affect the necessity which may have arisen from the enlargement of the plant." Hence, the fact that a small amount of electricity was sold outside the city limits, has no determinative bearing upon the question of law involved.

The plaintiff requests that the facts be reviewed by this Court. The Court has power to review facts in injunction proceedings. *Peters v. Highway Commission,* 184 N. C., 30, 113 S. E., 567. Nevertheless, there is a presumption that the judgment and findings of fact are correct and the burden is upon the appellant to assign and show error. *Plott v. Commissioners,* 187 N. C., 125, 126 S. E., 190.

Upon a review of the entire record, we are of the opinion that there is evidence to support the findings made by the trial judge and no error has been suggested warranting the overthrow of the presumption which said findings create.

Affirmed.

TOWN OF WAKE FOREST v. A. J. MEDLIN.

(Filed 2 July, 1930.)

Municipal Corporations H b—Ordinances regulating filling stations held constitutional and valid in this case.

While the operation of a filling station is not a nuisance *per se,* it may become so, and an incorporated town has in the exercise of its police power, C. S., 2673, 2787, the authority to regulate by ordinance the operation of gasoline filling stations within its limits when such power is not exercised arbitrarily or with unjust discrimination in violation of rights guaranteed by the State and Federal Constitutions, and *held:* where the main residential section of an incorporated town is on one side of a railroad track running through its center, and the main business section is on the other side of the track, an ordinance excluding the operation of filling stations in its exclusive residential section is valid, its provisions applying equally to all persons similarly situated, and the ordinance applies to a curb gasoline pump within the excluded area.

APPEAL by defendant from *Johnson, Special Judge,* at February Special Term, 1930, of WAKE.

Civil action to recover penalty for violation of town ordinance.

On 29 January, 1929, the board of commissioners of the town of Wake Forest, pursuant to charter and general statutory authority, duly adopted an ordinance, the pertinent part of which is as follows:

"1. That from and after the first day of February, 1929, it shall be unlawful to erect, build, maintain or operate any station for the sale or distribution of gasoline, kerosene, or any other petroleum products in any part of the town of Wake Forest west of the Seaboard Air Line Railway tracks."

The penalty for violating said ordinance is fixed at $50 for each day such violation shall continue.

For a long time before the adoption of said ordinance, and for a few days after it took effect, the defendant operated a curb pump, or gasoline filling station, and sold gasoline, in that portion of the town affected by said ordinance.

The town of Wake Forest (population between 1,500 and 2,000) is bisected from north to south by the tracks of the Seaboard Air Line Railway. The principal residential section of the town, including Wake Forest College and its various buildings, high school, church and residences, is located on the west side of said tracks. Through this section, thus thickly populated, runs State Highway No. 50, also numbered National Highway No. 1, parallel with the railroad tracks. There are only two mercantile establishments in this section of the town, one of which is owned by the defendant, in connection with which he has heretofore operated his curb pump or filling station.

The business section of the town, containing a number of stores, foundry, cotton-gin, saw-mill, etc., is to be found on the east side of the railroad tracks.

The ordinance recites that ample facilities for gasoline and filling stations are to be found north and south of the town limits and east of the railroad.

From a directed verdict for the plaintiff, on the admitted facts, and judgment for $50 and the costs, the defendant appeals, assigning errors.

Mills & Mills and Pou & Pou for plaintiff.

Clyde A. Douglass and Robert N. Simms for defendant.

STACY, C. J. All Wake Forest is divided into two parts, in one of which, the business section, east of the railroad, gasoline filling stations are allowed, in the other, the residential section, west of the railroad, gasoline filling stations are not allowed. The case presents the legality of such division and regulation. We are not now concerned with the validity of the ordinance as it may affect "any other petroleum products."

That the regulation of gasoline filling or gasoline storage stations comes within the police power of the State is freely conceded; and that such power is specifically conferred upon the plaintiff is likewise conceded. C. S., 2673 and 2787; *Burden v. Ahoskie,* 198 N. C., 92; *MacRae v. Fayetteville,* 198 N. C., 54; *Clinton v. Oil Co.,* 193 N. C., 432, 137 S. E., 183; *Bizzell v. Goldsboro,* 192 N. C., 348, 135 S. E., 50; *Cecil v. Toenjes,* 228 N. W. (Iowa), 874.

It is clearly within the police power of the State to regulate the business of operating such stations and to declare that in particular circumstances and in particular localities *(i. e.,* the residential section of a thickly populated town or city) a gasoline filling or gasoline storage station shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the State and Federal Constitutions. *Reinman v. Little Rock,* 237 U. S., 171. So long as the regulation is not shown to be clearly unreasonable and arbitrary, and operates uniformly on all persons similarly situated, the district itself being selected in the exercise of that reasonable discretion necessarily accorded the law-making power, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the law, within the meaning of the constitutional provisions on the subject. *Slaughter House Cases,* 16 Wall., 36. Perhaps it should be observed that the police power extends, not only to regulations designed to promote the public health, public morals and public safety, but also to those designed to promote the public convenience or the general prosperity. *C. B. & Q. Ry. v. Drainage Commissioners,* 200 U. S., 561, at page 592.

A gasoline filling or gasoline storage station may not be a nuisance *per se,* but it may become such, like a hospital *(Lawrence v. Nissen,* 173 N. C., 359), a livery stable *(S. v. Bass,* 171 N. C., 781), a dance hall *(S. v. VanHook,* 182 N. C., 831), a sawmill *(Barger v. Smith,* 156 N. C., 323), or a poolroom *(Brunswick-Balke Co. v. Mecklenburg,* 181 N. C., 386), because of its location or by reason of the manner in which it is conducted. Oil and gasoline, invariably used and stored in such stations, are so highly inflammable and explosive that they may, and do, increase the danger to fire, no matter how carefully the buildings are constructed and how noncombustible their materials. And although lawful and necessary buildings, they are of such character that regulation of the place of their erection and use comes well within settled principles relating to the exercise of the police power. "The State is not bound to wait until contagion is communicated from hospital established in the heart of a city; it may prohibit the establishment of such hospital there, because it is likely to spread contagion. So the keeping of dangerous explosives and inflammable substances, and the erection of buildings of combustible materials within the limits of a dense population may be prohibited because of the probability or possibility of public injury." *Walker, J.*, in *Durham v. Cotton Mills,* 141 N. C., p. 636.

Is the ordinance in question void for arbitrariness or unjust discrimination? We think not. It operates on all alike within the territory affected, and all within the prescribed limits are affected by its terms. *S. v. Roberts,* 198 N. C., 70. The town of Wake Forest is naturally separated into business and residential sections by the tracks of the Seaboard Air Line Railway. What was said in *Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469, would seem to be a direct authority for upholding the present ordinance. We are content to rest our decision on the substance of that opinion.

The appropriateness of the proceeding, a civil action by plaintiff to collect the penalty incurred under the ordinance, is not questioned. *S. v. Abernethy,* 190 N. C., 768, 130 S. E., 619.

Affirmed.

CLARKSON, J., dissenting: The uncontradicted testimony in this action was to the effect: That the defendant built his store building at the present location in 1905, and has ever since that time operated his business at that location, and during all that period has been engaged in the sale of gasoline at said place. He does not operate a filling station or a garage, but only has what is commonly known as a curb filling pump located beside the curb and drawing gasoline from an underground tank, all of the equipment being of the best approved and modern type. During all of the time of his operation there has never been any congestion around his place nor any accident of any kind, nor any interference with traffic or the safety of person or property. There has been no disorder of any kind, and there have been no fumes or odors emitted from the place and nothing unsanitary about it. There has been absolutely no noise attributable to it. During the twenty-five years of operation there has been no fire communicated from the place of business. Immediately across the sidewalk from the curb pump is defendant's brick building in which is operated a dining-room for the service and convenience of tourists and also a small store. The building is largely covered by ivy and is beautified by potted plants and is kept in a clean, sanitary and very attractive condition and is referred to in the evidence as a place of beauty. The nearest building to the brick building is the defendant's residence, which is a large and modern and handsome building fitted for and used by tourists as a lodging place. The nearest building is a residence across the wide main street and something like 150 feet distant from the gasoline pump. Northwardly from the pump the nearest building is a residence more than 500 feet away.

Dr. Paschall testified in part: "My home is in Wake Forest. I have been teaching at Wake Forest College since 1896. I am a graduate of Wake Forest College, and I have been living in the town of Wake Forest for thirty-three years. I am professor of Greek. I am thoroughly familiar with the town. I am thoroughly familiar with the location of Mr. Medlin's home and place of business. His home and place of business are neat and attractive. There is absolutely nothing that is unsightly. . . . I know that Mr. Medlin has been selling gasoline there for a good many years. I don't know of any accident or injury that ever occurred in connection with his business. There has been no occurrence there subject to criticism. There has been nothing about his place of business to cause congestion of traffic. . . . The college with all its buildings are within the campus area and walled off. None of the college property is interfered with in any way by Mr. Medlin's place. The school children are not interfered with in any way. . . . I have observed absolutely nothing at Mr. Medlin's place of business that was in any way deleterious to health, morals or the welfare of the people of the town of Wake Forest."

Dr. N. Y. Gulley, a witness for defendant, testified in part: "I have been living on Main Street in the town of Wake Forest for thirty-four years. During all that time I have been in charge of the Law Department of Wake Forest College. My residence is the nearest residence on the east side of Main Street to Mr. Medlin's place of business. I live just across the pasture from Mr. John Mills. I am familiar with the location of Mr. Medlin's place. I am familiar with the town generally and use of the highways. I was familiar with the location of Mr. Medlin's place even before he built his store and station. The operation of his place has been in no sense unsightly or objectionable. I have never seen or heard of anything in connection with it that had a tendency to affect the morals or welfare of the town of Wake Forest. I have never seen any congestion of traffic there. There is absolutely nothing to affect the health of the community. I see nothing objectionable to the place at all. There is nothing about the place or the operation of it that interferes with the students of Wake Forest College in any way. There are very few around there at all. The school children do not pass the Medlin place in going to and from school. The school is located south of the campus. There is nothing that interferes with children attending the public school."

Mr. C. Y. Holding, a witness for defendant, testified, in part: "I pass there frequently, and have from time to time observed his place of business and the manner in which it was conducted. Over this period of years I have not at any time observed anything at or about Mr. Medlin's place of business that would have a deleterious effect upon the morals, health, safety or welfare of the people of the town of Wake Forest. It has a good appearance. Its sanitary condition is good. I have never observed anything unsanitary about it at any time."

Dr. Sol. P. Holding testified in part: "I was raised at Wake Forest. I am practicing physician. I am duly licensed. I am thoroughly familiar with the town of Wake Forest. I have been there for fifty-eight years. I have observed Mr. Medlin's store frequently. As to the matter of appearance, it is the nicest in town. The store is very deep, and is a pretty place. . . . The tank is almost immediately in front of the brick building. . . . I have not observed anything about that place that is at all unsanitary. There is nothing about the place that would affect the health of the community."

Other witnesses testified to the same effect.

Whether or not a given ordinance does constitute a valid exercise of police power is a question not for the lawmaking body, but for the court. "A determination by the Legislature as to what is a proper exercise of the police power is not final and conclusive, however, but is subject to the supervision of the court. For, as has already been stated, the mere assertion by the Legislature that a statute relates to the public health, safety and welfare does not of itself bring such statute within the police power of the State. It is clear that legislative bodies under the guise of police regulations protecting the public welfare cannot arbitrarily pass laws which have no relation to that subject. Whether the police power has been exercised within the proper limitations, whether or not a law is reasonable, whether a particular measure is designed to further some governmental function or to further private gain, and whether an act bears any reasonable relation to the public purpose sought to be accomplished, are all judicial questions. In like manner, the question as to what are subjects for the lawful exercise of police power is a question for judicial determination. Therefore in its last analysis the question of the validity of measures enacted under the police power is one for the court." 6 R. C. L., at pages 241, 242; *McRae v. Fayetteville,* 198 N. C., 51, at p. 56.

Our Court says further in the *McRae case,* at p. 55: "The facts in reference to the reasonableness of ordinances of this kind are subjects of inquiry by the courts to determine the validity. *Board of Health v.*

Lewis, 196 N. C., 641; *Standard Oil Co. et al. v. Marysville,* Adv., Op. 445, Supreme Court Report, Vol. 49, p. 430."

"In order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare; and if the statute discloses no such purpose and has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge and thereby give effect to the Constitution." 6 R. C. L., sec. 230, pages 242, 243, and notes 12 and 13.

"As to the extent of this power, it is to be observed that a city cannot forbid the pursuit of an occupation in the particular locality or neighborhood merely on the ground that the occupation in question offends the sensibilities or æsthetic taste of the owners of adjacent property, and renders it less desirable for residential purposes and consequently less valuable. The use must be one which constitutes a nuisance in the legal sense, and the regulation must be reasonable." 19 R. C. L., p. 819, in section 123, note 10.

This Court has said, speaking through *Justice Brown,* in the case of *S. v. Whitlock,* 149 N. C., 542, at p. 543, "Æsthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. It is conceded to be a fundamental principle under our system of government that the State may require the individual to so manage and use his property that the public health and safety are best conserved. It is to restrict the owner in those uses of his property which he may have as a matter of natural right and make them conform to the safety and welfare of established society that the police power of the State is invoked.

"While this is true, yet it is fundamental law that the owner of land has the right to erect such structures upon it as he may see fit and put his property to any use which may suit his pleasure, provided that in so doing he does not imperil or threaten harm to others. Tiedeman Lim., 439.

"All statutory restrictions of the use of property are imposed upon the theory that they are *necessary* for the safety, health or comfort of the public, but a limitation which is unnecessary and unreasonable cannot be enforced. Although the police power is a broad one, it is not without its limitations, and a *secure* structure upon private property and one which is not *per se* an infringement upon the public safety and is not a nuisance cannot be made one by legislative fiat and then prohibited. *Yates v. Milwaukee,* 10 Wall., 497; 1 Dillon Municipal Corporation, 374."

Again the Court on page 544 says: "Æsthetic considerations are a matter of luxury and indulgence rather than a necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." *People v. Green,* 83 N. Y. Sup., 460; *Bill Posting Co. v. Atlantic City,* 71 N. J. Law, 73.

The language quoted above from the last mentioned case was cited with approval by this Court in the case of *S. v. Staples,* 157 N. C., 637, 37 L. R. A. (N. S.), 696.

This Court has said in *McRae v. Fayetteville, supra,* at p. 54, that "A gasoline station is not under the law *per se* a hazard. It might be to some an 'eyesore,' but the law does not allow æsthetic taste to control private property, under the guise of police power. Speaking to the subject we find in *City of Sturgeon v. Wabash Railway Co.,* 17 S. W. Rep., 2d series (Mo.), at p. 618, the following: 'The city has no power to declare that to be a nuisance which is not so at common law or by statute.' *Allison v. City of Richmond,* 51 Mo. Appeals, 133; *Carpenter v. Reliance Realty Co.,* 103 Mo. Appeals, 480; 77 S. W., 1004; *St. Louis v. Hertzeberg Packing & Provision Co.,* 141 Mo., 375; 42 S. W., 954; 39 L. R. A., 551; 64 American State Reports, 516; *Crossman v. Galveston,* 112 Tex., 303; 247 S. W., 810; 26 A. L. R., 1210. Even where the general power exists to declare a nuisance, a city cannot declare the place of a single individual to be a nuisance in the absence of a general regulation applicable to all others of the same class. 19 R. C. L., sec. 117. Neither can a city by virtue of the police power alone for purely æsthetic purposes limit the use which a person may make of his property. 19 R. C. L., 140."

"While there are no precise limits to the police power, it is not however without its limitations, since it may not unreasonably invade private rights, or violate those rights which are guaranteed under either Federal or State constitutions. Accordingly it is an established principle that the constitutional guaranty of the right of property protects it not only from confiscation by legislative edicts, but also from any unjustifiable impairment or abridgment of this right." 6 R. C. L., sec. 193, pages 195 to 196, Notes 16, 17 and 18.

"Legislative restrictions upon the use of property can only be imposed upon the assumption that they are necessary for the health, comfort or general welfare of the public; and any law abridging rights to a use of property which does not infringe the rights of others, or limiting the use of property beyond what is necessary to provide for the welfare and general security of the public, cannot be included in the police power of a municipal government." 6 R. C. L., sec. 208, p. 213, text and note 2.

"The Legislature may regulate when regulation will protect, but may not suppress when inhibition will injure the party pursuing the lawful vocation and proper regulations will prevent injury to others." 6 R. C. L., sec. 214, p. 214, p. 222, text and note 10.

"In order to sustain legislative interference by virtue of the police power under either a statute or a municipal ordinance it is necessary that the act should have some reasonable relation to the subjects included in said power, and the law must tend in a degree that is perceptible and clear toward the preservation of the public welfare, or toward the prevention of some offense or manifest evil, or to the furtherance of some object within the scope of the police power. The mere assertion by the Legislature that a statute relates to the public health, safety or welfare does not in itself bring that statute within the police power of the State; for there must be obvious and real connection between the actual provisions of the police regulation and its avowed purpose, and the regulation adopted must be reasonably adopted to accomplish the end sought to be attained. One application of the familiar rule that the validity of an act is to be determined by its practical operation and effect and not by its title or declared purpose is that a constitutional right cannot be abridged by legislation under the guise of police regulation; since the Legislature has no power under the guise of police regulation to invade arbitrarily the personal rights and personal liberty of the individual citizen or arbitrarily to interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations or to invade property rights." 6 R. C. L., sec. 227, p. 237, text and notes 1-11, both inclusive.

The section of the ordinance imposing the *penalty* (section 2 imposes no penalty), is as follows: "That any person, firm, or corporation erecting, building, maintaining, or operating any filling station for the sale or distribution of gasoline, kerosene, or other petroleum products, or garages for the purpose of doing repair work on automobiles or other kind of motor vehicles, in that part of the town of Wake Forest lying west of the tracks of the Seaboard Air Line Railway after the first day of February, 1929, shall be guilty of violating this ordinance, and shall be liable to the town of Wake Forest for a penalty of fifty dollars ($50) for each station or garage so erected, built, maintained, or operated; and each day such violation shall continue shall be considered a separate offense and shall subject the violator to a penalty for each day."

The ordinance says "Operating any filling station for the sale or distribution of gasoline," etc. The plaintiff's witness called it "the little tank which Mr. Medlin has had out there for twenty-five years; . . . it is covered with ivy and it is a brick building. It is a pretty place." Can this little curb filling pump be termed a filling station? It is so insignificant that it can hardly be so termed. The gasoline that is pumped up is underground. It is at defendant's home that he has occupied for a quarter of a century and this miniature project helps him to make a living. What is a proper exercise of police power is for the courts to determine. The confiscation of private property without compensation is a dangerous thing, and we are fast getting into quick-sand. It is a serious thing to turn over private property, that is not a nuisance *per se,* to the whim of different governing bodies, no matter how capable they may be, that today may destroy and tomorrow make alive.

It is decided by all the courts that a gasoline station is not a nuisance *per se.* This little miniature pump at Wake Forest has been there for years;—is so insignificant that it can hardly come within the purview of the ordinance.

There is not as much danger in selling gasoline in this miniature pump as in selling kerosene oil in a grocery store in a city, a town, or the country. Electricity used in the homes is far more dangerous than this little miniature pump, so are gas ranges, oil lamps and oil heater systems. The confiscation of private property, without compensation, is a dangerous thing. It makes chaotic the rights of private property. In buying property no person is safe, and values are uncertain.

"As variable as the shade
By the light quivering aspen made."

Of course you can regulate, but this is confiscation. In the present case there may be prescribed limits under the ordinance applicable to all, but those prescribed limits cannot confiscate private property that is so used that it is not a nuisance *per se,* and has no relation, as all the witnesses testify, to the public health, safety or welfare. Nor to public convenience or prosperity which latter is elusive power and savors of dangerous encroachment. Under the facts in this case, the application of the ordinance is a dangerous precedent and should be declared inoperative. The modern "Tom Thumb Golf Links" would hardly be termed an 18-hole golf course.

It may be noted that it appears from the evidence in this case that the highway passing the defendant's curb pump is State Highway No. 50, and is also National Highway No. 1, and that the same runs on the west side of the Seaboard Air Line Railway Company's tracks from the northern State line to and through Wake Forest and southwardly therefrom for a distance of five or six miles and then crosses the railway on an overhead crossing. It is a matter of common and public knowledge that it was the State's purpose to enable the users of this highway to travel upon the same without the necessity of crossing the railroad at grade anywhere. I think it unreasonable and arbitrary to enact an ordinance which would prohibit the ability of the users, both State and inter-state, of this highway for a distance of a mile and a half or two miles through the town of Wake Forest to obtain a drop of gasoline unless they depart from the highway and crossed over the main line tracks of the Seaboard Air Line Railway Company at grade in order to purchase the same from some filling station located across the railroad in the town of Wake Forest and nearer to the college properties than the defendant's place of business. This grade crossing, from the testimony of witnesses is a dangerous crossing. I think the ordinance as applicable to defendant's place invalid.

The brief of defendant is so thorough that I have used much of it in the preparation of this dissent.

JULIUS MARTIN II, TRUSTEE, v. JAMES R. BUSH ET AL.

(Filed 2 July, 1930.)

1. **Partnership A c—Where division of profits is only measure of compensation, agreement therefor is not partnership.**

   While one of the principles by which a partnership relation is determined is the sharing of the profits of an enterprise, a partnership is not established where the division of profits is looked to only as a measure for the compensation for services, and where the evidence tends to show only that the alleged partner exchanged notes with the one conducting a brokerage business for his accommodation, under an agreement for the mutual cancellation of the notes upon their maturity and for the payment of a share of the profits above a certain sum as compensation for certain services, and the payment of checks for a part of the profits in accordance with the agreement: *Held,* the evidence does not conclusively show a partnership and the refusal of a directed verdict on the issue is not error, the question being for the determination of the jury from the evidence.

2. **Contracts A h—Where evidence supports finding that contract set up in pleadings was void under C. S., 2144, judgment will be affirmed.**

   Where there is evidence that contracts set up by certain defendants in an action by the receiver of a brokerage business were founded upon speculation and based upon "margins," and that no actual delivery of the stock was intended by the parties: *Held,* the evidence is sufficient to support a finding that the contracts were void under C. S., 2144, and the finding is as conclusive as the verdict of a jury, and the judgment that such contracts were absolutely void will be sustained.

3. **Same—Burden is on party setting up contract to show that it is valid where verified pleading alleges it is void under C. S., 2144.**

   Where in an action by an assignee and trustee under C. S., ch. 28, it is alleged that one of the defendants was a partner in the business of the assignor and liable for the debts of the firm, and the other defendants admit this allegation and set up and seek to recover of the plaintiff and the alleged partner on contract with the assignor, the alleged partner is a defendant in the action on the contracts and her answer setting up the defense that the contracts were void under C. S., 2144, as gambling contracts, places the burden on the other defendants to prove that the contracts were lawful. C. S., 2146.

4. Appeal and Error—J c—Findings of fact supported by evidence are binding on appeal.

Under a compulsory reference the findings of fact by the referee upon supporting evidence and approved by the trial court are binding upon appeal to the Supreme Court, a jury trial not being demanded or the right thereto not being preserved.

5. Reference D d—Where issue on trial of exceptions to referee's report is answered adversely to excepting party he may not then move to confirm the referee's report.

Where the referee's report is favorable to the appellant in one particular, and he excepts to the report and the issue involving all his claims, including the particular found in his favor, is submitted to the jury and answered adversely to him, his motion to confirm the report is properly denied as being concluded by the general verdict.

APPEAL by plaintiff and certain defendants from *Johnson, Special Judge,* at November Special Term, 1929, of BUNCOMBE.

Civil action in which the plaintiff seeks the aid of equity in the administration of his trust.

The plaintiff's case on appeal contains the following statement: The complaint alleges in substance:

1. That the plaintiff is the trustee and assignee of the assets of the defendant James R. Bush, doing business under the name and style of "James R. Bush Brokerage House," by virtue of an assignment by said Bush to the plaintiff under the authority and in pursuance of chapter 28 of the Consolidated Statutes of North Carolina, whereby the plaintiff became vested with "all and singular the outstanding debts now due and owing to him, the said debtor, on account or in respect of his trade or business of stockbroker, as aforesaid; also any and all assets, real, personal or mixed, including trade debts, equities, claims, demands, choses in action, to which he may be in any manner entitled"; said instrument expressly authorizing and empowering the plaintiff to "call in, collect, compel payment of, and receive such outstanding debts," and particularly authorizing him "to bring such legal proceedings as in his judgment shall be necessary to properly reduce the same to possession"; and all said property and assets to be held by the plaintiff upon trust "for the equal benefit of his said creditors, and that the net proceeds of the collection of such assets shall be applied equally upon a percentage basis to the discharge of proven debts held by said creditors against the said debtor."

2. That the plaintiff, in the performance of the duties devolved upon him by said deed of assignment, has possessed himself of all the records, books, papers and accounts of the debtor's said business, but that said records are in such a confused and unorganized condition that the plaintiff is unable to ascertain to his satisfaction the true state of the accounts of said business, and that it has become apparent to the plaintiff that, by reason of the nature of the business of his assignor, there would be conflicting claims between the creditors of said business in respect of the validity of the claims of many of the prima facie creditors of said business, which must needs result in litigation and a multiplicity of suits and injurious waste of the trust estate.

3. That the apparent liabilities of said business, including claims of the general creditors of the assignor, would probably aggregate an amount in excess of $180,000; and the value of the undisputed assets of the trust estate, as will appear by the inventories which the plaintiff has filed in the office of the clerk of the Superior Court of Buncombe County, as required by law, will aggregate approximately $10,000.

4. That the defendant, Hope T. Robertson, claims to be a creditor of plaintiff's trustor to an amount in excess of $100,000, but that the plaintiff has information, both through papers and records in his hands and by parol, which lead plaintiff to believe, and he therefore alleges, that the true relation of the defendant Hope T. Robertson to the brokerage business of the defendant Bush is that of a silent and secret partner, so that, as against the lawful creditors of said brokerage business, said defendant Hope T. Robertson has no right or status as a creditor; and on the contrary, that said defendant is obligated and bound, equally with the defendant James R. Bush, for the payment of all lawful indebtedness of said brokerage business.

5. That the defendants James R. Bush and Hope T. Robertson, contriving to contravene the laws and public policy of the State as to the individual liability of partners to the creditors of the partnership, and to create an unlawful preference in favor of said Hope T. Robertson in respect of liabilities incurred by her in aid of said partnership, had made and entered into a certain written agreement between themselves, of date 14 April, 1927, attached to the complaint and marked "Exhibit A"; and further pursuing said unlawful designs, the defendant Bush had executed a deed of trust to the defendant Ellis C. Jones, conveying to said Jones several tracts of land therein described, in trust, for the purpose of securing the payment of the promissory note of the said Bush, in the sum of $50,000, payable to Troy Wyche, but which said Wyche had endorsed without recourse to said defendant, Hope T. Robertson; by reason of which all the security, benefits and advantages so afforded to said defendant Hope T. Robertson by said deed of trust

results and inures to the plaintiff for the benefit of the creditors of said "James R. Bush Brokerage House."

6. That an accounting in this action is required to enable the plaintiff properly to discharge the duties devolved upon him by said deed of assignment; and the plaintiff prays for such an accounting, and furthermore prays for judgment establishing the individual liability of said Hope T. Robertson for the lawful indebtedness of said brokerage house, and to charge her as trustee for the creditors of all the security, benefits and advantages received by her by virtue of the aforementioned deed of trust, and for an accounting of said trust, for costs, and for general relief.

Sundry of the defendants named as prima facie creditors of plaintiff's assignor, made answers to said complaint, in which they pleaded their claims as such creditors, and in which they associated themselves with the plaintiff in alleging that the defendant Hope T. Robertson was a partner with the assignor in the conduct of said brokerage business, and praying that she be held liable as such.

The defendant, Hope T. Robertson, answered said complaint denying that she was a partner with said Bush in said business, denying all material allegations of said complaint tending to charge her as such, and further pleading as a counterclaim for affirmative relief the indebtedness of the said Bush to her on open account in the sum of $35,000, and by the note secured by the deed of trust aforementioned in the sum of $50,000, and praying judgment accordingly.

Upon the issues joined by said pleadings, the case was sent to W. B. Snow, Esq., by compulsory reference to try all of said issues except the issue as to the alleged partnership between plaintiff's assignor and the defendant, Hope T. Robertson, which said latter issue was retained for trial by jury.

With very few exceptions, the claims of all persons against said estate were disallowed by the referee upon the ground that the transactions out of which said claims arose were had in violation of the Trading in Futures Act, and upon exceptions to said referee's report the findings of said referee were in most instances sustained, either by the rulings and findings of his Honor, the judge presiding, or by jury verdict in cases where trial by jury had been reserved by the claimants; with the result that only a very small number of the claimants had judgments signed in their favor. Divers claimants whose claims were disallowed are prosecuting several appeals to the Supreme Court, all of which will fully appear by the record.

The following issue, excepted in the order of reference, was answered by the jury in the negative: "Was the defendant Hope T. Robertson a partner with the defendant James R. Bush from and after 14 April, 1927, as alleged in the complaint?"

On the trial of this issue the plaintiff offered in evidence:

1. The following agreement and Hope T. Robertson's admission that she signed it:

This contract and agreement made and entered into this 14 April, 1927, by and between James R. Bush, of Asheville, N. C., party of the first part, and Hope T. Robertson, of Asheville, N. C., party of the second part,

Witnesseth, that whereas, the said Hope T. Robertson has this day executed and delivered to the said James R. Bush her promissory notes as follows: to wit, three notes in the sum of $10,000 each, and four notes in the sum of $5,000 each, payable four months after date with interest after maturity, said notes to be used and discounted by the said James R. Bush; and in exchange for the use of the above mentioned notes the said James R. Bush has this day executed and delivered to the said Hope T. Robertson his promissory note in the sum of $50,000, payable to Troy Wyche, and endorsed payable to Hope T. Robertson by the said Troy Wyche without recourse, which falls due on 14 April, 1928, without interest, and secured by deed of trust bearing even date herewith; and

Whereas, the said Hope T. Robertson, party of the second part hereto, has heretofore rendered to the said James R. Bush, party of the first part hereto, certain services in connection with the stock brokerage business now conducted by him in the city of Asheville, North Carolina, and whereas, the said Hope T. Robertson proposes to assist the said James R. Bush in his said business in the future, and for and in consideration of the services heretofore rendered by the said Hope T. Robertson, it is mutually agreed by and between the parties hereto as follows:

That the said James R. Bush shall pay to the said Hope T. Robertson the sum of $250 on 1 May, 1927, and the sum of $500 on the first day of each month for a period of 12 months beginning 1 June, 1927, and thereafter as long as this contract remains in force, plus an additional amount each month that the profits for the month from the brokerage business conducted by the said James R. Bush exceed $1,500 above expenses; said amount to be equal to one-third of the said net profits in excess of $1,500.

It is stipulated and agreed between the parties hereto that whereas the notes of the party of the second part are due and payable 4 months after date, and the note of the party of the first part is due and payable 12 months after date, that the notes of the party of the second part shall be renewed from time to time without interest until such time as the note of the party of the first part shall mature, and at which times the notes of both the party of the first part and the party of the second part shall offset each other, unless this contract is renewed by mutual consent.

In witness whereof, the said parties have hereunto set their hands and seals in duplicate, the day and year as above written.

JAMES R. BUSH. (Seal.)
HOPE T. ROBERTSON. (Seal.)

2. Two checks drawn by the defendant Bush, payable to Hope T. Robertson; one dated 15 April, 1927, for $3,000, and one dated 19 April, 1927, for $2,000. Also evidence of two other checks drawn by Bush, payable to Hope T. Robertson; one dated 30 April, 1927, for $250, and one dated 6 June, 1927, for $554.49. All these checks were paid under the terms of the contract.

Bush testified that the first two of these checks ($3,000 and $2,000) had been given to Mrs. Robertson "for anticipated profits we expected the business to make—advance profits"; and that it was all based on the contract of 14 April, 1927.

3. Financial statement of Hope T. Robertson, as of 15 April, 1927, showing total assets of $1,139,900, and total liabilities $219,000, given Bush to enable him to discount her notes in the sum of $50,000.

Mrs. Robertson introduced evidence in rebuttal, and at the close of the evidence the issue set out above was submitted to the jury. Judgment on the issue in favor of Mrs. Robertson and appeal by plaintiff. The plaintiff's exception and the exceptions of the appealing claimants are referred to in the opinion.

Carter & Carter for plaintiff.

Merrimon, Adams & Adams and Rollins & Smathers for Hope T. Robertson.

R. R. Williams of counsel for interested creditors.

G. H. Wright and J. C. Martin for C. H. Cocke.

J. N. Horner, Jr., for T. P. Cheesborough, Jr., N. N. Beadles, and Warren E. Day.

MacRae & MacRae for Jessie Hicks, Hannah Y. Gaskill, J. W. Easton, R. L. Raibourne, A. R. Brownson, Hamilton Block, and F. E. Peckham individually and as trustee.

Bourne, Parker & Jones for Robt. G. Harris.

PLAINTIFF'S APPEAL.

ADAMS, J. At the conclusion of the evidence bearing upon the issue of partnership the plaintiff made written request that the judge give the jury the following special instruction: "The court holds as a matter of law that the written contract between the defendants, James R. Bush and Hope T. Robertson, of date 14 April, 1927, and the contemporary writings, the authenticity of which is conclusively established by the pleadings herein, created a partnership between said defendants, and the jury is, therefore, directed to answer the issue Yes."

The prayer was declined and the issue was submitted to the jury and answered against the plaintiff.

Inclusion of "the contemporary writings" seems to indicate that the plaintiff regarded the contract as insufficient of itself to establish the alleged partnership. These writings consisted of the four checks which Bush gave Mrs. Robertson and a signed statement of her financial condition. The plaintiff's appeal therefore presents for review the single question whether the papers just referred to and the contract signed by James R. Bush and Hope T. Robertson on 14 April, 1927, as explained by Wyche, Bush and Mrs. Robertson, are of such import as to demand compliance with the plaintiff's prayer.

It is difficult to define "partnership" in terms of universal application. There is no one exclusive test which is uniformly recognized. A community of interest in the property and a community of interest in the profits have been held to be sufficient; but if there is neither of these elements, or if there is only one in the agreement, there is no partnership. *Day v. Stevens,* 88 N. C., 83. Other tests are the community of power in the management of the business and the reciprocal relationship of principal and agent. It has been repeatedly said in our own decisions that the usual but not the universal test is participation in the profits and losses of the business. *Jones v. Call,* 93 N. C., 170; *Kootz v. Tuvian,* 118 N. C., 393; *Webb v. Hicks,* 123 N. C., 244; *Bolch v. Shuford,* 195 N. C., 660. It is said in other cases that, as a rule, all persons who share in the profits of a business incur the liability of partners. *Motley v. Jones,* 38 N. C., 144; *Bank v. Odom,* 188 N. C., 672. But participation in the profits involves liability for the losses. *Mauney v. Coit,* 86 N. C., 463, 470. As expressed by *Henderson, C. J.,* "He who shares in the profits, which are nothing but the net earnings, should also share in the losses, if there be any." *Cox v. Delano,* 14 N. C., 89. It is to be noted, however, that these cases contemplate participation in profits as profits—not merely as a means of ascertaining the compensation which under the contract is to be paid for services or in satisfaction of any other specific obligation. *Mauney v. Coit, supra; Fertilizer Co. v. Reams,* 105 N. C., 283; *Cossack v. Burgwyn,* 112 N. C., 304. A partnership is not created by a contract under which one of the parties is to have a share in the profits of an enterprise as the measure of his compensation for service or attention. *Lance v.*

Butler, 135 N. C., 419; *Trust Co. v. Ins. Co.,* 173 N. C., 558; *Gurganus v. Mfg. Co.,* 189 N. C., 202.

One of the considerations recited in the contract made by Bush and Mrs. Robertson is "certain services" which she has performed for him in connection with the "stock brokerage business conducted by him in the city of Asheville." His agreement to pay and her agreement to accept for her services "one-third the net profits in excess of $1,500 would not, as we have shown, necessarily establish between them the relation of partners. The suggestion in *Machine Co. v. Morrow,* 174 N. C., 198, that one who shares in the profits of a business either from capital invested or for services rendered, becomes a partner, must be read in connection with this subsequent statement: "It would be otherwise if it were shown that the share in the profits was merely a method of fixing the amount of the salary."

It would be inaccurate to say that the agreement of 14 April, 1927, conclusively describes the nature of Mrs. Robertson's service; it would be no less inaccurate to say that the agreement creates a partnership. Suppose, as Mrs. Robertson testified, Bush was to pay and she was to receive $500 a month and a percentage of the profits for the use of the notes ($50,000) which she executed for Bush's accommodation: the transaction would be a loan by Mrs. Robertson and an agreement by Bush to repay the amount borrowed at all events, and would be upheld as falling within the principle pointed out in *Fertilizer Co. v. Reams, supra.* The result would not be changed if we should concede that there is evidence tending to establish the partnership relation; the evidence is not conclusive, but subject to rebuttal; and the evidence relating to the actual intention of the parties was submitted to the jury under instructions to which the plaintiff did not except and was determined against his contention.

On the plaintiff's appeal we find no error.

APPEAL BY CLAIMANTS.

ADAMS, J. Some of the defendants in their answers to the complaint set up cross-actions to recover damages against Mrs. Robertson and the plaintiff as trustee of James R. Bush. They allege in general terms that they deposited with Bush, who conducted a brokerage business in Asheville, money and stocks which he received on their account and converted to his own use. In bar of recovery in the cross-actions it was contended that the contracts which the claimants made with Bush are void because in contravention of section 2144 of the Consolidated Statutes. This statute condemns certain contracts for "futures" and declares them to be "utterly null and void."

Charles H. Cocke seeks to recover $21,607.46, alleged to be due him after his stock had been sold and after his account had been charged with certain items he owed Bush. The referee's findings of fact with respect to this claim occupy four pages. The trial judge approved them and made the additional finding that the claimant did not intend to take personal delivery of the stock, but did intend that Bush would take charge of his orders, and that he should have the right to pay Bush the balance due if he desired and should be financially able to do so.

The invalidity of the claims in question was set up in the answer of Mrs. Robertson. C. S., 2146, provides that when a defendant specifically alleges that the cause of action is founded upon a contract made void by statute and the answer shall be verified, the burden shall be upon the party asserting the cause of action to prove by proper evidence that the contract is lawful in its nature. The judge held in effect that this had not been proved and concluded that this claim is invalid. His findings of fact are supported by the evidence and are binding upon this Court; and we have discovered no sufficient cause for disturbing his conclusions of law, after considering them in the light of the claimant's argument and the authorities cited in his brief. *Welles v. Satterfield,* 190 N. C., 89; *McGeorge v. Nicola,* 173 N. C., 707.

Other claimants appealed. Thomas P. Cheesborough, Jr., N. N. Beadles, W. E. Day, A. R. Brownson, Hamilton Block, Frank E. Peckham, and Frank E. Peckham, assignee, sought to recover the value of certain stocks closed out at the time of Bush's failure and balances alleged to be due on account of money deposited with Bush, some of them during a long course of dealings in buying and selling stocks. No particular benefit would be derived from a minute discussion of the exceptions entered by the respective parties. There is ample evidence to sustain the finding that Bush operated a "bucket shop" brokerage; that the various transactions were founded upon speculation and based upon "margins"; and that there was no intention of the parties that actual delivery of the stock should be made. We affirm the judgment invalidating these claims and declaring them to be null and void under the statute.

With respect to the claim of R. G. Harris the trial court found the facts to be that the claimant had purchased "curb stocks" of the value of $5,299.25, for which he made full payment at the time of the purchase; that he had left these stocks with Bush, and that Bush had converted them. The court held as a conclusion of law that the claimant is entitled to recover $5,299.25, the value of the curb stocks, but is not entitled to recover $10,995.71, which grew out of transactions prohibited by the statute. The claimant excepted to the latter conclusion.

If we concede the testimony to be conflicting upon the point in dispute there is at least some evidence in support of the finding that the parties dealt in "futures" based upon "margins," and did not contemplate the actual delivery of the stock; and this finding is as conclusive as the verdict of a jury. As to this claim the judgment is therefore affirmed.

The claims of Jessie H. Hicks, Hannah Y. Gaskill, J. W. Easton, and R. L. Raibourne were submitted to the jury. These parties filed answers setting up cross-actions for the conversion of stock. They contend that because Bush filed no answer to their cross-actions, made no denial of their claims, and did not plead chapter 39 of the Consolidated Statutes in bar of their actions, they are entitled to judgment against him.

The plaintiff, as assignee of Bush, alleges that Bush and Mrs. Robertson were partners. These claimants not only admit the allegation; they seek to recover a judgment against both. Mrs. Robertson, therefore, is a defendant in these actions. She filed an answer specifically pleading chapter 39 as a defense, thereby shifting the burden of proof to the actors. They bore this burden throughout the trial and could not abrogate it after final judgment.

Upon his findings of fact the referee concluded as a matter of law that all the transactions of R. L. Raibourne were void, except the contract for the purchase of one Tokio bond valued at $780.25. The jury found that Raibourne's claim was not valid. He then tendered judgment for $780.25. The judge declined to sign it, since the claimant had excepted to the referee's findings of fact and conclusions of law and the controversy had been settled by the jury. Raibourne excepted. The issues he tendered were framed so as to include the whole transaction, and the issue submitted to the jury was of equal scope. The motion to confirm a part of the report after the general issue had been answered by the jury was properly denied.

We find no reversible error in the instructions complained of in the sixth, seventh, ninth, tenth, eleventh, and twelfth exceptions, or in the court's refusal to give the prayers referred to in the thirteenth, fourteenth, and fifteenth assignments of error. *Welles v. Satterfield, supra; Burns v. Tomlinson,* 147 N. C., 634.

No error.

CITIZENS LUMBER COMPANY v. DON S. ELIAS.

(Filed 2 July, 1930.)

1. **Corporations G c — General manager of corporation has general authority to bind corporation in maters within scope of its powers.**

   While the president of a corporation has ordinarily only the authority to make contracts binding on the corporation by resolution of the board of directors, when this position is combined with that of general manager the limitation of his power as the former does not apply to curtail his powers as general manager, and as the latter he may generally bind the corporation in all matters within the scope of its powers.

2. **Same—Where corporation has power to purchase stock of other like corporations, contract therefor by general manager is binding on it.**

   Where a corporation existing under the laws of this State has conferred upon it the power to acquire stock in competitive corporations, a contract for the purchase of such stock made by its general manager falls within the scope of his powers and is binding on the corporation without a resolution by the board of directors authorizing such purchase when the contract is made in good faith for its advantage.

3. **Corporations G g—Corporations may ratify act of officer by knowingly receiving benefits from the transaction.**

   Where a contract is made by an officer of a corporation in good faith and for its benefit with knowledge of its board of directors, the corporation by knowingly accepting the benefits of the contract may become bound by its terms by ratification thereof, though the one acting for it may not have had authority express or implied to make the contract in its behalf.

APPEAL by plaintiff from *Schenck, J.,* at March Term, 1930, of BUNCOMBE. Affirmed.

This is an action, first, to have a contract entered into by and between the president and general manager of the plaintiff corporation, and the defendant, for the purchase from the defendant of certain shares of the common stock of another corporation, for and in behalf of the plaintiff, adjudged void, and of no binding force or effect insofar as the plaintiff is concerned, for that said contract was not authorized by its board of directors, or by its stockholders; second, to have certain paper-writings executed in the name of the plaintiff corporation by its president, and attested by its secretary, purporting to bind the plaintiff by its guarantee that certain certificates for preferred stock, of the par value of $200,000, issued to defendant by the corporation, whose common stock had been purchased for and transferred to the plaintiff, pursuant to the provisions of said void contract, would be redeemed by said corporation, in cash, at par, and on a fixed date, ordered surrendered and canceled, for that the execution of said paper-writings in its name by its president was not authorized by the board of directors, or by the stockholders of plaintiff corporation; and, third, to recover of the defendant the sum of $50,000, paid to defendant, out of the funds of the plaintiff, by its president, pursuant to the terms of said void contract.

The facts admitted in the pleadings or shown by the evidence offered at the trial, are as follows:

On or about 1 November, 1925, Walter P. Taylor, at said date, and for several years prior thereto, the president and general manager of the plaintiff corporation, after negotiations which were known to the members of its board of directors, and to its stockholders, purchased from the defendant, Don S. Elias, for the plaintiff, three hundred shares of common stock of the Southern Steel and Cement Company, a corporation organized under the laws of this State, and caused the certificates for said shares of stock to be duly transferred to the plaintiff. In payment of said shares of stock, the said Walter P. Taylor, as president and general manager of the plaintiff corporation, caused its check for $50,000, to be drawn and delivered to the defendant. This check was duly paid by the bank on which it was drawn, and charged to the account of plaintiff by said bank. The said Walter P. Taylor, as president and general manager of the plaintiff corporation, further caused certificates for 2,000 shares of the preferred stock of plaintiff corporation, of the par value of $200,000, to be issued and delivered to the defendant, with the guarantee of plaintiff that it would redeem said certificates in cash, at par, on 1 November, 1930, upon tender of same by defendant to the plaintiff. As the result of said contract of purchase, defendant sold and delivered to plaintiff corporation three hundred shares of the common stock of the Southern Steel and Cement Company, receiving therefor as aforesaid the sum of $250,000. Certificates for said shares of stock were duly transferred to plaintiff, and dividends thereafter declared by the Southern Steel and Cement Company, out of its earnings, were paid to the plaintiff, as the owner of said shares of stock.

After said purchase had been completed, pursuant to an agreement in writing thereafter executed in the name of the plaintiff corporation, by Walter P. Taylor, as its president, and attested by D. G. Devenish, as its secretary, with its corporate seal attached, the defendant surrendered the certificates for 2,000 shares of the preferred stock of plaintiff corporation theretofore issued to him, and accepted in lieu thereof certificates for 2,000 shares of the preferred stock of the Southern Steel and Cement Company, of the par value of $200,000. Pursuant to said agreement, there was attached to each of said certificates, a paper-writing executed in the name of the plaintiff corporation by Walter P. Taylor, its president and attested by D. G. Devenish, its secretary, in words as follows:

"State of North Carolina—County of Buncombe.

The undersigned hereby guarantees the redemption by cash, of certificate No. ...., of the Southern Steel and Cement Company's preferred stock attached hereto, at par, plus accrued dividends on 1 November, 1930, provided notice and demand by registered mail is given to us at least 30 days prior thereto.

CITIZENS LUMBER COMPANY,
By ...., President.

Attest: ....,
Secretary."

Plaintiff is a corporation organized in 1912 under the laws of this State, with its principal office and place of business in Buncombe County. During the year 1925, and for several years prior thereto, plaintiff was and had been engaged in the business of buying, selling and dealing in building materials and supplies of all kinds, as it was authorized to do by its certificate of incorporation. It was authorized by its certificate of incorporation, not only to engage in said business, but also to purchase the business of any person, firm or corporation engaged in the same business. Prior to 1925, under this authority, plaintiff had purchased and operated the business of other corporations and thereby earned and paid in dividends to its stockholders large sums of money. Such purchases had been made by the said Walter P. Taylor, as president and general manager of the plaintiff corporation.

During the year 1925, and for several years prior thereto, Walter P. Taylor was and had been the president and general manager of the plaintiff corporation. Its business had grown in volume and prospered under his management, and its stockholders and board of directors had entrusted to him the full control and management of said business. They had implicit confidence in his business judgment, and relied upon the same without question. He was the owner of a large number of the shares of the common stock of plaintiff, and by reason of such ownership, as well as by reason of his official relations to the plaintiff, was interested in its success.

During the year 1925, and for several years prior thereto, the Southern Steel and Cement Company, a corporation organized under the laws of this State, with its principal office and place of business in the city of Asheville in Buncombe County, was and had been engaged in the business of buying, selling and dealing in building materials and supplies of all kinds. It was a competitor in business of the plaintiff. The defendant, Don S. Elias, was the principal stockholder of said Southern Steel and Cement Company, and as such controlled its business. Walter P. Taylor purchased his stock, as well as the stock of another stockholder, for and in behalf of the plaintiff, and after such purchase the business of the said Southern Steel and Cement Company was conducted in the interest of the plaintiff, as the owner of its common stock.

Neither the purchase of defendant's stock in the Southern Steel and Cement Company, nor the guarantee of the redemption of its preferred stock, by the paper-writings attached to the certificates issued to defendant, was authorized by resolutions adopted by the board of directors or by the stockholders of plaintiff corporation. The members of the said board of directors, who were the owners of practically all the common stock of the plaintiff corporation, were advised by Walter P. Taylor of the negotiations between him, as its president and general manager, and the defendant, for the purchase of the shares of the common stock of the Southern Steel and Cement Company owned by the defendant, and knew that said purchase had been made, and that said stock had been acquired and was owned by plaintiff. No objection was made by the said directors and stockholders to the purchase of said stock at any meeting of said board of directors or of said stockholders, or at any other time, until a special meeting held at the office of the plaintiff, on 24 September, 1928. Shortly before said meeting members of the said board of directors learned for the first time that Walter P. Taylor, as president of the plaintiff corporation, in addition to the payment to defendant of the sum of $50,000, and the issuance to him of certificates for 2,000 shares of the preferred stock of the Southern Steel and Cement Company, in payment of the common stock purchased from defendant, had executed the paper-writings purporting to guarantee the redemption of said certificates, in accordance with the terms therein set out. At said meeting held on 24 September, 1928, resolutions were adopted, repudiating the contract by which the shares of common stock of the Southern Steel and Cement Company were purchased by Walter P. Taylor from the defendant, and also repudiating the contracts with respect to the redemption of said certificates for preferred stock.

At a meeting of the board of directors of the plaintiff corporation, held subsequent to the meeting at which said resolutions were adopted, the said board of directors by resolution duly adopted, ordered and directed that the certificates for the three hundred shares of the common stock of the Southern Steel and Cement Company, purchased from the defendant by Walter P. Taylor, and then owned by the plaintiff, be sold, assigned and delivered to the said Walter P. Taylor, upon the transfer by him to the plaintiff of a like number of the shares of the common stock of the plaintiff. Pursuant to this resolution, the said certificates were thereafter sold, assigned and delivered to the said Walter P. Taylor, who in payment for same transferred and assigned certificates for the like number of shares of the common stock of plaintiff, to the plaintiff. At the commencement of this action, plaintiff did not own the shares of the common stock which had been sold and transferred to it by defendant, pursuant to the contract made with defendant by Walter P. Taylor, as president and general manager of plaintiff, on or about 1 November, 1925. Although plaintiff has an option to repurchase said stock from Walter P. Taylor, it has not repurchased them. Walter P. Taylor now owns said stock, having purchased same from plaintiff. The stock is held by a bank, in escrow, to be delivered to plaintiff when and if it shall exercise its option to repurchase same.

At the close of all the evidence, defendant's motion that the action be dismissed as of nonsuit was allowed.

From judgment dismissing the action the plaintiff appealed to the Supreme Court.

Rollins & Smathers, A. Hall Johnston and Shuford & Hartshorn for plaintiff.

Bernard, Williams & Wright for defendant.

CONNOR, J. It is not alleged in the complaint, nor was it contended at the trial of this action, that the contracts entered into by and between the president and general manager of the plaintiff corporation, and the defendant, for the purchase from defendant of shares of the common stock of the Southern Steel and Cement Corporation, and for the payment of the purchase price for said stock in accordance with the terms of the contract of purchase, were ultra vires, and therefore void and of no binding force and effect on the plaintiff. It is expressly provided in the certificate of incorporation of the plaintiff, that in order that plaintiff may properly prosecute the business in which it was authorized therein to engage, "the said corporation shall have full power and authority to purchase, lease and otherwise acquire, hold, mortgage, convey and otherwise dispose of all kinds of property, both real and personal, both in this State and in all other States, territories, and dependencies of the United States; to purchase the good will, business and all other property of any individual, firm or corporation, as a going concern, and to assume all its debts, contracts and obligations, provided said business is authorized by the powers herein conferred." The Southern Steel and Cement Company was a corporation organized under the laws of this State and, by virtue of the powers and authority conferred upon it as a corporation by its certificate of incorporation, was engaged in the identical business as that in which the plaintiff was and had been engaged at and prior to the date of said contracts. Therefore the contracts to purchase from the defendant the common stock of said corporation, and to pay for the same, in accordance with the contract of purchase, and thus acquire control of its business, were within the express power conferred upon plaintiff as a corporation. In addition to this express power, conferred upon plaintiff by its certificate of incorporation, the plaintiff, as a corporation organized under the laws of this State, has the power, by virtue of C. S., 1166, to "purchase stock, securities, and other evidences of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such to exercise all the rights, powers and privileges of ownership."

It is not alleged in the complaint nor was it contended at the trial of this action that the contracts entered into by and between the president and general manager of the plaintiff corporation, and the defendant, for the purchase from defendant of shares of the common stock of the Southern Steel and Cement Company, and for the payment of the purchase price for said stock, in accordance with the terms of the contract of purchase, were fraudulent, or not in good faith. All the evidence is to the effect that in entering into said contracts, the president and general manager of the plaintiff, and the defendant, both acted in good faith, and with no purpose to defraud the plaintiff. Indeed, but for the business depression which has occurred since the date of said contracts, it does not appear that they were not in the interest of the plaintiff. No complaint was made by the directors and stockholders of plaintiff until after the business of both the plaintiff and the Southern Steel and Cement Company had fallen off in volume as the result of business conditions in Buncombe County and elsewhere.

The question, therefore, presented for decision by this appeal is whether the president and general manager of a corporation organized under the laws of this State, who by virtue of his office has full control and management of the business of said corporation, may, without express authority conferred by resolution of the board of directors or of the stockholders of said corporation, adopted in a meeting of said board or of said stockholders, purchase the stock of another corporation, for and in the name of his corporation, and bind the same by contracts in its name for the payment of the purchase price for said stock, where the purchase of said stock is within the corporate powers of his corporation, and is made in good faith for its benefit and in its interest.

It is well settled that the general manager of a corporation has larger and broader powers than its president. Ordinarily, the president of a corporation has no power to bind the corporation by contracts executed by him in its name, without the express authority of its board of directors. Contracts made by him, without such authority, are not binding upon the corporation, and unless ratified by its board of directors or by its stockholders, cannot be enforced against the corporation. "Aside from his position as presiding officer of the board of directors and of the stockholders when convened in general meeting, the president of a corporation, has by virtue of his office, merely, no greater power than that of a director. Whatever authority he has must be expressly conferred on him by statute, charter, or by-law, or the board of directors, or be implied from express powers granted, usage or custom, or the nature of the company's business. He may be, and frequently is, made the chief executive officer of the company and invested with broad general powers of management and superintendence; and in such case he necessarily has many implied powers." 14a C. J., 93, sec. 1858(3).

When the by-laws of a corporation provide for the election by the board of directors of a general manager of the corporation, and the board of directors by virtue of such provision, have elected a general manager, as in the instant case, in the absence of limitations upon his authority in the by-laws or by the action of the board of directors, he has the power to bind the corporation by contracts made in good faith, and within the corporate powers, without any resolution of the board of directors expressly authorizing the contracts. *Supply Co. v. Machin,* 150 N. C., 738, 64 S. E., 887. In *Morris v. Basnight,* 179 N. C., 298, 102 S. E., 389, it is said: "The contract to convey is sufficient in form, and having been executed by the general manager of the company, apparently within the course and scope of his powers, and in the line of the company's business, is prima facie binding on the company. *Bank v. Oil Mill,* 157 N. C., 302, 73 S. E., 93; *Clowe v. Imperial Pine Products Co.,* 114 N. C., 304, 19 S. E., 153."

Again in *Watson v. Mfg. Co.,* 147 N. C., 469, 61 S. E., 273, it is said: "The management of the entire business of a corporation may be entrusted to its president either by express resolution of the directors, or by their acquiescence in a course of dealing." *Brown, J.,* writing the opinion in this case, quotes with approval from Thompson on Corporations as follows: "A stranger dealing with the corporation is not affected by secret restrictions upon his (such manager's) powers of which he has no notice. In short, the powers of one who has been appointed general manager of the business of the corporation are, in America, generally understood to be coextensive with the general scope of its business." In the instant case there was no restriction, secret or otherwise, upon the powers of the president and general manager of the plaintiff corporation. The contracts challenged by this action were similar to other contracts theretofore made by him, the validity of which had never been questioned by the corporation.

"The general manager of a corporation has general charge, direction and control of the affairs of the company for the carrying on of which it was incorporated. He is to be distinguished from a person who has the management of some particular branch of the business. While it is said that he is virtually the corporation itself, and that his implied powers are coextensive with the general scope of the business of the corporation, yet the ultimate control rests with the board of directors. The office of general manager is of broader import than that of president. The fact that a person having an active conduct of the business of a corporation is also its president does not operate as a limitation upon the powers usually exercised by its general agents or managers. His authority is not limited to that possessed by virtue of his office as president, but is incidental to the management of the business." 14a C. J., 94, sec. 1862(9). See, also, 7 R. C. L., 628, section 627 where it is said: "At the present time the general business of corporations is frequently entrusted to the management of a general manager, and it is well recognized that the corporation is bound by the acts of such manager within the apparent scope of his authority. The fact that a person having the general direction and active conduct of the business of a corporation is also its president does not operate as a limitation of the powers usually exercised by such agents or managers. His authority is not limited to that possessed by virtue of his office as president, but is incident to the management of the business."

Without regard to the facts shown by all the evidence, tending to show that the board of directors and the stockholders of plaintiff corporation, ratified the contracts made by its president and general manager with the defendant, with respect to the purchase of the shares of common stock of the Southern Steel and Cement Company and for the payment of the purchase price for such shares of stock, we are of opinion that plaintiff cannot recover in this action for that the said contracts were valid and binding on the plaintiff. Even if the contracts were not authorized, all the evidence shows that they were subsequently ratified by the corporation, and are therefore binding upon it. The corporation accepted the benefits of the contract of purchase, with full knowledge on the part of the directors that the stock had been purchased from defendant by its president and general manager, and sold and transferred the certificates for same after the directors were fully advised of the guarantee of redemption in the name of the corporation of the preferred stock of the Southern Steel and Cement Company issued to the defendant in part payment of the purchase price of the stock. See *Weathersby v. Texas & Ohio Lumber Co.,* 107 Tex., 474, 180 S. W., 735, 7 A. L. R., 1440 and note, in which it is said by the annotator that "it is well established that when an officer, without authority so to do, enters into a contract for a corporation, and the corporation receives and retains the benefits of the contract after acquiring knowledge of the circumstances attending its execution, it thereby ratified the contract and makes it good by adoption." See, also, *Morris v. Y. & B. Corporation,* 198

N. C., 705, where the principles upon which the doctrine of ratification are founded and the decisions of this and other courts, applying these principles, are fully discussed by *Clarkson, J.*

The judgment dismissing the action, at the close of the evidence, on motion of defendant under C. S., 567, is

Affirmed.

C. S. SOUTHERLAND v. W. T. CRUMP, EXECUTOR OF J. A. SOUTHERLAND, DECEASED.

(Filed 2 July, 1930.)

1. **Judgments L a—Where record contains no evidence of payment of costs of prior action, directed verdict for plaintiff will be held error.**

   Where, after judgment as of nonsuit, another action has been brought on the same cause of action within one year under the provisions of C. S., 415, and defendant moves for judgment as of nonsuit and excepts to the trial court's refusal of the motion, and on appeal the only question presented is whether the plaintiff had paid the costs of the prior action as required by the statute: *Held*, the burden is upon the plaintiff to show compliance with the statute and where the record on appeal contains no evidence that the costs of the prior action had been paid, a directed verdict in the plaintiff's favor will be held erroneous, and it cannot be presumed that such evidence was properly before the jury from the fact that the trial court stated at the close of testimony that as he understood the evidence he would have to give a directed verdict that the costs had been paid, to which counsel did not object until after a verdict in the plaintiff's favor.

2. **Appeal and Error E g—On appeal the record imports verity.**

   On appeal to the Supreme Court the record imports verity and the Court is bound by what it contains.

ADAMS, J., dissenting; CONNOR, J., concurs in dissent.

APPEAL by defendant from *Daniels, J.*, and a jury, at December Term, 1929, of DUPLIN. Reversed.

This is an action brought by plaintiff against the defendant to recover on a special contract and on *quantum meruit.* The jury found that there was no special contract, but gave a verdict on the *quantum meruit.* The defendant also set up the plea of the statute of limitations.

The plaintiff offered in evidence summons issued 27 February, 1922, served 28 February, 1922, by sheriff of New Hanover County, in case entitled, C. S. Southerland *v.* J. A. Southerland. Judgment of nonsuit in the above case at December Term, 1926, Judgment Docket No. 14, page No. 253. Bill of cost in above case marked "Paid." Summons in case entitled C. S. Southerland *v.* W. T. Crump, executor of J. A.

Southerland, issued 20 January, 1927, served 31 January, 1927. Plaintiff offered judgment of nonsuit in last mentioned case rendered at the August Term, 1927, also judgment of the Supreme Court at Spring Term, 1928, filed 14 March, 1928, and also judgment of the clerk of the Superior Court as of the judgment of the Supreme Court, rendered .... day of ...., 1928. Plaintiff offered summons in case of C. S. Southerland *v.* W. T. Crump, executor, issued 12 March, 1929, received by sheriff of Scotland County 14 March, 1929, and served 14 March, 1929. Further necessary facts will be set forth in the opinion.

Judgment was rendered for plaintiff on the *quantum meruit.* Defendant made numerous exceptions, and assigned errors and appealed to the Supreme Court.

Oscar B. Turner for plaintiff.
George R. Ward for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions and in this we think there was error.

The sole question involved in this appeal is whether the cost in the second action was paid before the present action was instituted.

C. S., 415 is as follows: "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought *in forma pauperis.*" See *Hampton v. Spinning Co.,* 198 N. C., 235.

The former action in this cause, by an opinion of the Supreme Court filed 14 March, 1928, upon motion for nonsuit at the close of all the evidence made by defendants, was affirmed. *Southerland v. Crump,* 195 N. C., 856. The present action was instituted by the issuance of summons on 12 March, 1929—within one year after the nonsuit in the original action.

In *Rankin v. Oates,* 183 N. C., 517, it is decided that the burden to repel the plea of the statute of limitations is on the plaintiff. The defendants set up the plea of the one year statute of limitations.

The record introduced by plaintiff does not show that the costs in the original action had been paid by the plaintiff before the commencement of the new suit. There is no evidence that "the original suit was brought *in forma pauperis.*" The statute is mandatory and the burden is on the plaintiff to show compliance.

Seventh issue: "Is the plaintiff's cause of action barred by the three year statute of limitations as alleged in the answer? Answer: No."

Eighth issue: "Is the plaintiff's cause of action barred by the one year statute of limitations, as alleged in the answer? Answer: No."

We find the following in the record: "I instruct you, if you believe the evidence in the case, you will answer the seventh issue, No, and also the eighth issue No. (At the close of the testimony, the court stated to counsel on both sides, that as he understood the evidence, he would have to charge the jury that if they believed the evidence, they would decide that plaintiff's action was not barred by the statute of limitations. At that time, the court understood there was evidence, that the cost in both nonsuits had been paid before the pending action had been instituted. To this, counsel, all of whom heard this statement, made no response, and did not argue this phase of the case to the jury; and, the court, at the conclusion of the argument charged the jury as he had intimated, without objection or question on the part of counsel. Their first objection to this instruction is contained in the exception to this part of the charge contained in defendant's case on appeal, and in their exception to the refusal to nonsuit.) To so much of charge as is embraced in brackets above, just above the statement inserted by the court, defendant, in apt time, excepted," and assigned error.

The judge in the court below said that he "understood" there was evidence that the cost in both nonsuits had been paid. But in this he was evidently laboring under a misapprehension, for the record is wanting in this respect. The statement made by the court below and what occurred thereafter, does not show an admission or estoppel by counsel. Counsel for defendant was careful at the close of plaintiff's evidence and at the close of all the evidence to make motions for judgment as in case of nonsuit to protect his client's rights. These rights were preserved by exceptions and assignments of error duly made.

It is conceded that, on the record filed in this Court, the evidence of the plaintiff is not sufficient to repel the plea of the statute of limitations. But it is contended that as "the court understood there was evidence that the cost in both nonsuits had been paid before the pending action had been instituted," it is permissible for us to assume that evidence of this character was brought to the attention of the jury in some proper way, and may have been inadvertently omitted from the record on appeal. With respect to a disputed question of fact we can know judicially only what the record discloses. *Harper v. Bullock,* 198 N. C., 448, and *Harrington v. Wadesboro,* 153 N. C., 437, are not at variance with this position, but in support of it.

Indeed, in every case where the trial court overrules a motion to nonsuit, he does so with the understanding that the evidence is sufficient to carry the case to the jury. And this is the very question we are called upon to review.

In settling the case on appeal, the careful judge did not state that there was an agreement or admission by counsel for defendant that the cost had been paid, nor that there was evidence of it—neither do we. The court below was not stating contentions of the parties where it is the duty of counsel to except promptly or his objection is waived. *S. v. Sinodis,* 189 N. C., at p. 571. The record imports verity, we are bound by what it contains. The judgment is

Reversed.

ADAMS, J., dissenting. The plaintiff brought suit to recover an amount alleged to be due him for providing rooms, lodging, and board for the defendant's testator and for service rendered in a sale of his land. The jury returned a verdict upon an implied contract, awarding the plaintiff $162.50 with interest for his service in procuring a sale of the land and $360 with interest for board, care, and maintenance. In answer to the seventh and eighth issues the jury found that the plaintiff's action was not barred by the three-year or the one-year statute of limitations.

The defendant moved as provided in C. S., 567, for judgment as in case of nonsuit. The court denied the motion, the defendant excepted, and the plaintiff recovered a judgment from which the defendant appealed.

The plaintiff brought an action against J. A. Southerland in which the summons was issued on 27 February, 1922. Judgment of nonsuit was entered in December, 1926, and the bill of cost was paid. On 20 January, 1927, the plaintiff brought suit against the defendant, executor of J. A. Southerland, on the same cause of action, and at the August Term of 1927, the action was dismissed. On the plaintiff's appeal to the Supreme Court the judgment was affirmed at the Spring Term of 1928. On 12 March, 1929, the plaintiff commenced the present action against the defendant on the same cause. It was heard and determined at December Term, 1929, of the Superior Court of Duplin.

The only question considered in the opinion of the Court is whether the plaintiff paid the cost incurred in the second action before instituting the present suit, as required by C. S., 415. If he paid it his cause of action is not barred. On this point the record evidence gives us no information; but Judge Daniels instructed the jury to find, if they believed the evidence, that the plaintiff's action was not barred by the statute of limitations. He set out his reason for giving this instruction: "At the close of the testimony, the court stated to counsel on both sides, that as he understood the evidence he would have to charge the jury, that if they believed the evidence, they would decide that plaintiff's action was not barred by the statute of limitations. At that time, the court understood there was evidence, that the cost in both nonsuits had been paid before the pending action had been instituted. To this, counsel, all of whom heard this statement, made no response, and did not argue this phase of the case to the jury; and the court, at the conclusion of the argument, charged the jury as he had intimated, without objection or question on the part of counsel. Their first objection to this instruction is contained in the exception to this part of the charge contained in the defendant's case on appeal, and in their exception to the refusal to nonsuit."

His Honor informed the attorneys that as he understood the evidence he would be compelled to give the directed instruction. He did so at the close of all the evidence; at the time the defendant was required to renew his motion for nonsuit and to give the reasons for his motion. No doubt his reasons were given. The alleged right of nonsuit turned upon the question whether the action was barred, and whether the action was barred turned upon the question whether the cost had been paid. It is perfectly obvious that Judge Daniels understood from the evidence that the cost had been paid. He said so: "At that time the court understood there was evidence that the cost in both nonsuits had been paid before the pending action had been instituted." To understand a thing is to comprehend or to make out the meaning of it; not to guess at it. When he "understood there was evidence that the cost in both nonsuits had been paid" he evidently understood there was evidence before him to this effect. This is the natural and reasonable construction of his statement, for it is hard to see how he could have imagined there was such evidence or could have "labored under a misapprehension" as to material evidence on the really vital point in the case.

It is said, however, that the record imports verity and that it does not disclose any evidence that the cost had been paid. When the trial judge before instructing the jury stated in effect, in the presence of counsel, that he understood the evidence to be that the cost had been paid and that for this reason it was his duty to give the directed instruction on the last two issues, and this statement is made a part of the case on appeal, we may safely apply the words of *Hoke, J.*, that "in support of the validity of the verdict and judgment it is proper for the appellate court to assume that a fact of this character was brought to the attention of the jury in some permissible way," although it may have been inadvertently omitted from the record on appeal. *Harrington v. Wadesboro,* 153 N. C., 437, cited and approved in *Harper v. Bullock,* 198 N. C., 448.

When counsel made no response to the statement set out above it was natural for the judge to conclude that there was no difference of opinion as to the evidence, and that they acquiesced in what he said. Under these circumstances the defendant should be bound by the instruction of which he now complains. The legal effect would be the same if he knew that an error of fact had been committed and remained silent when he was impliedly, if not expressly, invited to speak. It is said that we can "know judicially only what the record discloses." This is true if the word "record" is intended to include the case on appeal; but the case on appeal discloses facts which estop the defendant. The controlling principle is not the verity of the record but the acquiescence of the defendant in the judge's statement of what he understood the evidence to be; and acquiescence imports and is founded on knowledge and consent.

In the appellee's brief it is said, "There is no contention that the cost in both nonsuits had not in fact been paid, as indeed there could be none."

For the reasons given I do not concur in the opinion of the Court.

CONNOR, J., concurs in dissent.

STATE v. A. H. RITTER, L. E. VAUGHN, ALEX. McKENZIE AND WOOLSEY WALL.

(Filed 2 July, 1930.)

1. **Conspiracy B b—Evidence of criminal conspiracy held sufficient to sustain verdict of guilty in this case.**

   Evidence in this case that one of the defendants in the presence and with the concurrence of the other, both engaged in the unlawful dealing in intoxicating liquor, offered to pay a certain sum of money for the killing of a person who had given information regarding illicit stills in that community, is held sufficient for a conviction of both for a conspiracy to kill. (See *S. c.*, 197 N. C., 113.)

2. **Same — Acts or declarations of conspirator is competent evidence against co-conspirators.**

   Where two or more persons associate themselves together in a criminal conspiracy, any act or declaration made by one of them in the presence of the others in furtherance of the common object and forming a part of the *res gestæ* is competent in evidence against the others.

3. **Criminal Law D b—Criminal conspiracy is a felony under statute and Superior Court has original jurisdiction of prosecution.**

While formerly under the common law a conspiracy was a misdemeanor, is changed by statute to a felony, C. S., 4173, applying to crimes of this class, providing that in the case of an offense done in secrecy and malice where the punishment is not provided for in the statute, the punishment may be by imprisonment in the State prison, and C. S., 4171, defining crimes so punishable as felonies, and the Superior Court has original jurisdiction of a prosecution for a conspiracy to kill, and the recorder's court does not have exclusive original jurisdiction thereof, and improper venue must be met by a plea in abatement made in apt time, C. S., 4606, before plea of not guilty.

4. **Criminal Law L i—Rulings and instructions in this case held to be in accordance with opinion granting new trial and to be free from error.**

Where on appeal of a prosecution for criminal conspiracy a new trial is awarded because of error in the admission of certain evidence, upon the new trial in the Superior Court the defendant's plea of former jeopardy and motion to dismiss is properly disallowed, and where the admission of evidence and the charge of the court is in accordance with the opinion in the former appeal the defendant's exceptions thereto cannot be sustained.

5. **Criminal Law I e—Explanation to jurors why some of alleged conspirators were being tried while others were not is not prejudicial error.**

In the course of a prosecution for conspiracy an explanation to prospective jurors why some of the alleged conspirators were being tried while others were not, and proof of the fact during the trial is held not to be prejudicial error entitling the defendants to a new trial.

APPEAL by defendants A. H. Ritter and L. E. Vaughn, from *Sink, Special Judge,* at January Term, 1930, of RICHMOND. No error.

This was an indictment against the defendants for *conspiracy.* The bill charges that the defendants "on 3 July, 1927, did wrongfully, and unlawfully and wilfully and feloniously conspire and confederate to kill and murder and to cause to be killed and murdered one Cleveland Cagle, and in carrying out said conspiracy and confederation to kill and cause to be killed said Cagle did unlawfully, wilfully and feloniously offer to contract to pay to one Charlie Patterson the sum of $200, and to give said Patterson whiskey and protect him in the commission of said murder with the sheriff and other officers of Moore County, contrary to the form and statute in such cases made and provided, and against the peace and dignity of the State."

The evidence was to the effect that one Cleveland Cagle, who lived about a mile from Carthage, was active in prosecuting and stopping the manufacture and sale of intoxicating liquor in his community. The evidence on the part of the State in this regard against Ritter and Vaughn was plenary. Ritter said to Cagle, when both Vaughn and

Ritter were present: "By God, what do you have to do about it, you s— of a b—; you are breaking up all the stills and everything else," and then he went to accusing and cussing. On the last night in June, 1927, between 12 and 1 o'clock, Cagle and certain officers captured a car about eight miles from Carthage; Vaughn and Woolsey Wall were in Vaughn's car, and they captured eighteen to twenty gallons of whiskey, in a keg in the back seat of the car. "We back-tracked that car from there about a mile or a mile and a half. It was a country road, and we back-tracked that car, and just at the break of day, we tracked that car to where it had turned off that road to a fellow's house and tracked it in the woods about a quarter of a mile and in about .... miles of a big still where it had just been let out, and there must have been about 2,000 gallons of beer in there, and it was warm. We destroyed that still."

Vaughn was indicted and plead guilty of possessing and transporting liquor.

There was abundant evidence to be submitted to the jury in regard to conspiracy against both Ritter and Vaughn. Alex. McKenzie plead guilty to the bill of indictment, and his evidence alone was sufficient to be submitted to the jury, and much evidence other than his. Alex. McKenzie testified in part: "I called Charlie (Patterson) and told him some folks wanted to see him, and he came out and we all walked down to the spring. Bud (A. H.) Ritter had a coca-cola bottle of whiskey in his pocket, and Charlie (Patterson) took a drink and I took a little, and one of the others, Vaughn or Bud, took a drink. The spring is about as far from Charlie's house as from here to the street or maybe a little further. They got to talking, and Bud wanted to know of Charlie if the officers were pretty bad after a fellow for whiskey, and Charlie said, 'Yes, they are pretty bad down here,' and Bud said, 'I got a little job I would like you all to do. There is a damn son of a b— up there that is turning up everything. I'll give you and Alex $100 to go up there and knock him in the head and let an automobile run over him and knock him in the head or run the automobile over him.' 'If you don't do it for that, I will give you $200 each, and Sheriff Fry said he would give $500 on the side.' I said, 'Bud, that would not be giving a man a chance.' He said 'The damn son of a b— don't need a chance; he has had too many chances now.' They talked on about this Clay Cagle; they called him Clay or Cleve one, and said, 'We are going to come back down here tomorrow, and you all make up your minds and go with us and get him out and kill him or get him where we can get hold of him, and kill him, and we will give you all $500, and Sheriff Fry will give you all $500. Don't you boys be drinking, as we are coming back tomorrow.' Bud was doing the talking. Vaughn was there and Vaughn said, 'Don't be drinking.' "

The defendants introduced no evidence. Woolsey Wall has never been taken. The jury returned a verdict of guilty against Ritter and Vaughn. The court below rendered judgment on the verdict. The defendants excepted and assigned numerous errors and appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. R. Clegg, F. W. Bynum, N. McN. Smith and L. B. Clegg for Ritter and Vaughn.

CLARKSON, J. This action was before this Court before, and a new trial granted. *S. v. Ritter and Vaughn,* 197 N. C., 113. In that opinion the law of what constitutes *conspiracy* and the kind of evidence to sustain the charge is fully set forth. The action was sent back for a new trial on the declarations of Alex. McKenzie, and it is there said at p. 116: "The declarations of Alex. McKenzie, made after he had abandoned the conspiracy, and not in furtherance of the common design, but in derogation of it, and in the absence of the other conspirators, while competent against him, yet, we think, are inadmissible as evidence against the defendants Ritter and Vaughn. *S. v. Dean, supra* (35 N. C., 63); *S. v. George, supra* (29 N. C., 321). Nor can the admission of this evidence be held for harmless error. It undoubtedly weighed heavily against defendants."

At the trial of the present action, from which this appeal was taken, the defendants introduced no testimony, and at the close of the State's evidence the defendants moved to dismiss the action. C. S., 4643. The court below overruled this motion, and in this we can see no error.

A contention of defendants: Did the Superior Court of Richmond County have jurisdiction? We think so. Conceding, but not deciding, that the recorder's court had exclusive original jurisdiction of all crimes below the grade of felony within twelve months after the commission of the offense, and this offense was committed within the twelve months, yet we think the *crime of conspiracy,* now a *felony* and not a *misdemeanor.* The crime of conspiracy at common law was a misdemeanor. *S. v. Jackson,* 82 N. C., 565. We think this has been changed by statute.

C. S., 4171: "A felony is a crime which is or may be punishable by either death or imprisonment in the State's prison. Any other crime is a misdemeanor."

C. S., 4172: "Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned in the county jail or State prison not exceeding two years, or be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or State prison not less than four months, nor more than ten years, or be fined."

C. S., 4173: "All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or *State prison* for not less than four months nor more than ten years, or shall be fined."

Public Laws of N. C., 1927, ch. 1, C. S., 4173, was amended "by inserting after the word 'jail' before the word 'for' in line 5 of said section the following words, 'or State prison.' "

Interpreting, then, this addition to section 4173, in connection with section 4171, it makes the particular offense in the instant case, having been done in secrecy and malice, distinctly a felony. That section is not defining offenses, but providing punishment for them and it, therefore, sets aside, as the necessary effect of the amendment, the offenses in the latter clause as felonies, to be punished by imprisonment in the State's prison. Consequently, properly interpreted, this amendment of 1927 creates a conspiracy formed in secrecy and in malice, a felony, which, using the words in section 4171, may be punishable by imprisonment in the State's prison.

Under C. S., 4606, improper venue must be met by plea in abatement. The defendant's plea in abatement was made in the lower court for the first time when this case came on for trial after a new trial was granted Ritter and Vaughn, therefore it was not made in apt time. A plea in abatement is too late after a plea of not guilty. *S. v. Oliver,* 186 N. C., 329; *S. v. Hooker,* 186 N. C., 761; *S. v. Mitchem,* 188 N. C., 608.

Another contention of defendants: Are the exceptions and assignments of error of the defendants to the evidence offered over their objection well taken? We think not.

The principle of law in reference to this evidence is thus stated in 12 C. J., p. 634, part sec. 227(3), under *Conspiracy:* "In the reception of circumstantial evidence, great latitude must be allowed. The jury should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue, and which will enable them to come to a satisfactory conclusion."

Wharton's Criminal Evidence (10 ed.), p. 1672: "We may be satisfied from circumstances attending a series of criminal acts that they result from concerted and associated action, although if each circumstance was considered separately it might not show confederation, but, where linked together circumstances that in themselves are inclusive, yet taken as a whole, may show that apparently isolated acts spring from a common object and have in view the promotion of a common purpose." *S. v. Anderson,* 92 N. C., 732; see *S. v. Brady,* 107 N. C., 822.

In 4 Elliott on Evidence, p. 203, part sec. 2939, the principle is thus stated: "It is perhaps the universal rule that any act done, or any declaration made, by any one of the conspirators in the furtherance or perpetrations of the alleged conspiracy may be given in evidence against himself or his coconspirators. This rule has been more aptly stated as follows: 'The law undoubtedly is, that where two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestæ,* may be given in evidence against the other.'" *S. v. Anderson,* 92 N. C., 732; *Saunders v. Gilbert,* 156 N. C., 463; *S. v. Davis,* 177 N. C., 573; *S. v. Connor,* 179 N. C., 752; *S. v. Stewart,* 189 N. C., 340; *S. v. Ritter et al., supra.*

The defendants made several other contentions: "Should the defendants' plea of former jeopardy and motion to dismiss in conformity with the opinion of the Supreme Court on file in this cause have been allowed?" We think not. "Is it either necessary or proper to explain to prospective jurors why one man is being tried and another is not, or to prove this fact in the trial of a cause?" We see no prejudicial error from what was done. "Is the opinion of the Supreme Court excluding evidence on an appeal binding on the court below when a new trial is being had?" We think the court below followed the former opinion in trying the action. "Should the exceptions to the charge of the court be sustained?" We think not. On the whole, the charge of the court below set forth the law, and applied the law applicable to the facts.

From a careful reading of the charge by the court below, we think it fair to the defendants. It defined what was conspiracy, and charged: "If from all the evidence you shall find, beyond a reasonable doubt that Ritter and Vaughn, between themselves, agreed to kill or to procure another to kill the witness, Cagle, or if they, along with Alex McKenzie and Wall, or any one else, agreed to kill or have killed the witness, Cagle, and that they so conspired and agreed among themselves with the intention to destroy or have destroyed the witness, Cagle, and you shall be so satisfied, beyond a reasonable doubt, it would be your duty to find the defendants guilty. If, on the other hand, upon an examination of all the testimony you shall fail to be so satisfied, or shall accept the defendants' contentions that there was no conspiracy, that there was no act on their part from which you can infer conspiracy, or from all the evidence that there was none, then it would be your duty to return a verdict of not guilty. . . . The defendants have not gone upon the witness stand, which is their privilege. Under the laws of the State of North Carolina, a defendant may or may not go on the witness stand, and the fact that he does not go upon the witness stand shall not be considered by the jury against him, and the fact that a defendant does, or does not go on the stand, must not be considered against him. The defendants are presumed to be innocent, and that presumption follows them throughout the trial. . . . The defendants say (speaking of the State's witnesses) they are not worthy of belief; that, they were all drinking and were not capable of understanding the nature of their acts and conduct; that, the witnesses, Patterson and McKenzie, are interested parties, and that, McKenzie is particularly interested, and that you should scrutinize his testimony and analyze it. . . . The defendants contend to the contrary, that they were there for a lawful purpose, and while drunk, that there was no conspiracy to murder; that, it was unnatural and unreal, and that, if they had desired to destroy or have destroyed the witness Cagle, they would not have sought out a strange negro and a white man they were not well acquainted with, at least, with whom one was not well acquainted, and that you should fail to find, beyond a reasonable doubt that the defendants are guilty, and that you should acquit them."

The facts were for the jury to determine. The contentions given by the court below on both sides and the charge of the court below was fair, and we can see no error in law to give a new trial. We may state that two juries, twenty-four men free from bias, have found the defendants guilty.

We are indebted in the preparation of this opinion to the most excellent brief of the Attorney-General and Assistant Attorney-General. In law we can find

No error.

CORNELIA T. JESSUP ET AL. v. THOMAS NIXON.

(Filed 2 July, 1930.)

1. **Mortgages H p—Heirs at law of deceased mortgagor may bring action to redeem land even though estate was insolvent at time of sale.**

   The heirs at law of a deceased mortgagor are not precluded in proper instances from bringing suit to redeem the mortgaged land on the ground that the sale was not made in compliance with the terms of the mortgage even though the estate of the mortgagor was insolvent at the time of the sale.

2. **Mortgages H h—Execution of power of sale must be had in strict conformity with provisions in mortgage.**

   Where a mortgage conveyance expressly provides that the mortgagee should give written notice thirty days before exercising the power of sale contained therein, the provisions must be strictly complied with to extinguish the equity of redemption.

3. Appeal and Error I b—Under the facts of this case the doctrine of the law of the case does not preclude court from reviewing former decision.

Where on appeal in an action to redeem lands from a mortgage sale the Supreme Court holds that the heirs at law of a deceased mortgagor may not bring action to set aside the mortgage when at the time of the sale the estate of the mortgagor was insolvent, but states that there was no evidence that the power of sale had been improperly executed, and on subsequent appeal it is held that the former decision was the law of the case and precluded further inquiry: *Held,* upon a petition to rehear where the record discloses that the power of sale had not been properly executed, the doctrine of the law of the case will not preclude the court from determining the phase of the case not before the Court at the time the first decision was rendered when the rights of third persons have not intervened, the Court having the power to review its own decisions.

CLARKSON, J., dissenting.

CIVIL ACTION, before *Moore, Special Judge,* at April Term, 1928, of PERQUIMANS.

From judgment rendered in this cause the defendants appealed to the Supreme Court, and the opinion of the Court is reported in 196 N. C., 33, 144 S. E., 375.

Thereafter, in apt time, the plaintiffs filed a petition to rehear. The petition was granted and additional briefs were filed by the parties, and the cause is now before us for decision.

This same cause was considered by this Court and opinions rendered and reported in 186 N. C., 100, 118 S. E., 908; 193 N. C., 830, 136 S. E., 722, and 196 N. C., 33, 144 S. E., 375. The facts are fully set forth in said cases, and therefore it becomes unnecessary to restate them.

Ehringhaus & Hall and McMullan & Leroy for plaintiffs.

Whedbee & Whedbee, Thompson & Wilson, H. S. Ward and Stephen C. Bragaw for defendant.

BROGDEN, J. Are the heirs at law of a deceased mortgagor precluded from setting aside a sale of the mortgaged premises, not made in compliance with the terms of the mortgage, when at the time of said sale the estate of the mortgagor was insolvent and unable to pay more than fifty-three per cent of the indebtedness thereof?

From time immemorial it has been held by the courts that the law looks upon a mortgagor with a kindly eye, and this legal beneficence has grown into a maxim "that once a mortgage always a mortgage." *Ray v. Patterson,* 170 N. C., 226, 87 S. E., 212. It is also beyond question in this jurisdiction that the heirs at law of a deceased mortgagor may maintain an action to redeem. *Rich v. Morisey,* 149 N. C., 37, 62 S. E., 762; *Morris v. Carroll,* 171 N. C., 761, 88 S. E., 511.

In the case at bar, the ancestor of plaintiffs executed a mortgage providing for the exercise of power of sale "upon written notice to the party of the first part for thirty days that prompt payment is expected and upon default thereof sale will be made under the power of this mortgage," etc. The jury found in response to the first issue that the mortgagee failed to give written notice for thirty days that prompt payment was expected. Therefore, the sale was not properly made and the equity of redemption was not extinguished, for "in an instrument of this kind the law is that a statutory requirement or contract stipulation in regard to notice is of the substance, and unless complied with a sale is ineffective as a foreclosure, and even when consummated by deed the conveyance only operates to pass the legal title, subject to certain equitable rights in the purchaser, as of subrogation, etc., in case he has paid the purchase money in good faith." *Brett v. Davenport,* 151 N. C., 56, 65 S. E., 611; *Eubanks v. Becton,* 158 N. C., 231, 73 S. E., 1009.

The opinion of the Court in 196 N. C., 33, followed the opinion reported in 186 N. C., at p. 100, and the petition to rehear attacks the legal soundness of that opinion. In 186 N. C., 100, 118 S. E., 896, the Court said: "The plaintiffs must show that the assets of the estate were sufficient to pay his debts before they could ask the court to decree that they recover this land and its rents when the creditors had not been paid in full." In other words, this proposition means, as the writer interprets it, that the heirs at law of a deceased mortgagor cannot assert the right to redeem even though the sale be invalid, when it appears that the estate was insolvent, and that it would be necessary to sell the land at any event to make assets to pay debts. The cases cited in the opinion in 186 N. C., 100, in support of the principle announced are *Highsmith v. Whitehurst,* 120 N. C., 123, 26 S. E., 917, and *Russell v. Roberts,* 121 N. C., 322, 28 S. E., 406. In the *Highsmith case* an action was instituted to sell the land to make assets and the administrator was the purchaser at the sale. The widow and heirs at law of the mortgagor sought to redeem the land. It did not appear that the sale had been improperly made, and the attack upon the sale failed, because in referring to the proceeding the Court declared: "And while it is not as formal as it might have been, it appears to have been substantially correct and authorized the defendant administrator to sell the land." Clearly the equity of redemption was properly extinguished, and the only question left in the case was whether the conveyance could be set aside on the ground of fraud for the reason that the administrator was the purchaser of the property. The Court said: "Indeed, it is shown that the plaintiffs could not have been injured by the purchase of Barnhill, though made for the administrator, as the land sold for $1,211, when the jury on the trial of this case found that at the date of the sale it was only worth $1,200."

In the *Russell case, supra,* it appeared without question that the land was properly sold and brought a fair price, and that every dollar of the purchase money was applied to the payment of debts of decedent.

These cases, therefore, hold that if the power of sale is properly exercised, the equity of redemption is properly extinguished, and hence, in order to set aside a conveyance upon the ground of fraud because it was purchased by a person acting in a fiduciary relation, injury must be shown, and in such event, if no injury is shown, the conveyance will not be set aside.

However, the case at bar presents both aspects of the legal question, because the jury has found that the power of sale was not properly exercised, and that the sale was invalid from the beginning. Indeed, the proposition that the insolvency of the estate of the mortgagor precluded the exercise of the right of redemption was considered by this Court in *Rich v. Morisey,* 149 N. C., 37. In that opinion the Court said: "The defendants except to his Honor's refusal to permit them to show that O. B. Morisey was insolvent at the time of his death. We see no error in this. It was not relevant to, and could not affect the verdict upon any issue, besides, with the final account of the administrator in evidence, unimpeached, insolvency was clearly shown."

In the case at bar the report of the administrator clearly showed insolvency, and thus the *Rich case* is positive authority that mere insolvency of the estate will not preclude the heirs at law of the mortgagor from asserting the right of redemption where the sale of the land was not properly made.

After careful examination, we are of the opinion that the decision in 186 N. C., p. 100, with respect to the right of redemption is not in accord with the weight of authority or the logic of the law.

The decision of the Court reported in 196 N. C., 33, adopted the view that the decision in 186 N. C., 100, was the "law of the case," and, therefore precluded further inquiry. *Ray v. Veneer Co.,* 188 N. C., 414, 124 S. E., 756; *Mfg. Co. v. Hodgins,* 192 N. C., 577, 135 S. E., 466; *Newbern v. Tel. Co.,* 196 N. C., 14, 144 S. E., 375. Undoubtedly this is a strong position and presents serious legal difficulty. However, it has been held in *School Directors v. City of Asheville,* 137 N. C., 503, 50 S. E., 279, that the doctrine of "law of the case" does not preclude the Court from reviewing its own decision, "certainly when no rights of property have become vested or change made in the status of the parties by reason of a ruling at some former stage of litigation." Furthermore, in the appeal reported in 186 N. C., p. 100, the Court expressly said that "there was no evidence that due notice and advertisement of sale were not given in 1896, or that the mortgage sale was not regular." In the record now before us the jury finds upon competent evidence that the sale was not properly and regularly made, and conceding that the principle of "law of the case" is salutary and essential in giving uniformity and permanence to judicial decision, it is apparent that it should not be applied in full vigor to a phase of the case which was not before the Court at the time the decision was rendered. That is to say, in the case reported in 186 N. C., p. 100, the evidence tended to show that the sale was regularly made. In the case as now constituted it appears that the sale was not regularly made. Hence the "law of the case" does not preclude the Court from determining the question as now constituted.

There are many exceptions in the record, and we have given earnest and careful consideration to the records, the briefs, the petition to rehear, and the additional briefs filed by the parties, and have come to the conclusion that the judgment rendered at the April Term, 1928, of Perquimans Superior Court ought to be upheld and affirmed, and it is so ordered.

Petition allowed.

CLARKSON, J., dissenting: I signed the petition for a rehearing in this action so that again this long drawn out controversy could be reconsidered. I cannot make up my mind that the petition should be allowed.

On 30 March, 1896, Francis Nixon, Jr., died and left several children, all are dead except Cornelia T. Jessup, the plaintiff, a minor six years of age at her father's death. On 11 August, 1921, she brought this action, nearly ten years after she became of age, against her uncle the defendant.

The case came on for trial at April Term, 1923. The issues submitted to the jury and their answers thereto will explain the controversy:

"1. Was the deed from David Cox, mortgagee to the defendant, invalid and ineffective to pass the equitable title to the land in question, because made without notice of sale and advertisement, as alleged in the complaint? Answer: Yes.

2. Was said deed invalid and ineffective to pass the equitable title to said land because the same was sold subject to the homestead rights of the children, as alleged in the complaint? Answer: Yes.

3. What was the fair market value of said land at the time of said sale, to wit, 1 July, 1896? Answer: $1,250.

4. Did the defendant fraudulently procure the foreclosure of said mortgage and the sale of said land and cause the same to be sold subject to the dower interest of the widow and the homestead rights of the children of Francis Nixon and thereby obtain the same at a grossly inadequate price, as alleged in the complaint? Answer: No.

5. Did the defendant, while administrator, and with a purpose of purchasing the property in question at an undervaluation cause or know-

ingly permit it to be understood at such sale that he was purchasing such property for the benefit of the heirs of Francis Nixon, deceased, as alleged? Answer: No.

6. Is plaintiffs' cause of action barred by the ten-year statute of limitations, as alleged in the answer? Answer: No.

7. Did plaintiffs discover, or could they by due diligence have discovered prior to three years before the commencement of this action the fraudulent conduct of defendant alleged in the complaint and referred to in the fourth and fifth issues? Answer: (Not answered by jury.)

8. Is plaintiff's cause of action based on alleged fraudulent conduct of defendant barred by the three-year statute of limitations as alleged in the answer? Answer: (Not answered by jury.)"

Judgment on the verdict was rendered for the plaintiff and on appeal this Court found error. 186 N. C., 100. The case came on for trial again at April Term, 1928, and the following issues were submitted to the jury and their answers thereto:

"1. Did the mortgage sale from Dr. David Cox, to the defendant, Thomas Nixon, fail to comply with the terms of the mortgage, in that said sale was had and made without written notice for thirty days that prompt payment was expected, and, in default thereof, sale would be made under the power of the mortgage, as alleged in the complaint? Answer: Yes.

2. Did said mortgage sale fail to comply with the terms of said mortgage, in that said sale was had and made subject to the dower rights of the widow, and to the homestead rights of the children of Francis Nixon, Jr., as alleged in the complaint? Answer: Yes.

3. Is plaintiff's cause of action barred by the statute of limitations, as alleged in the answer? Answer: No."

The only serious contention is that the defendant Thomas Nixon failed to comply with the terms of the mortgage "in that said sale was had and made without written notice for thirty days that prompt payment was expected," etc.

It will be noted that the defendant was administrator of Francis Nixon, Jr., and the judgment at April Term, 1923, found: "What was the fair market value of said land at the time of said sale, to wit, 1 July, 1896? Answer: $1,250. Did the defendant fraudulently procure the foreclosure of said mortgage and the sale of said land and cause the same to be sold subject to the dower interest of the widow and the homestead rights of the children of Francis Nixon and thereby obtain the same at a grossly inadequate price, as alleged in the complaint? Answer: No."

From the proceeds of the sale and other assets, defendant had 53 per cent to pay on Francis Nixon, Jr.'s, debts. The fair market value of the land at the time was $1,250, which would about pay the debts of Francis Nixon, Jr., and practically nothing would be left for plaintiff, heir at law, if all the debts were paid. As the jury found there was no fraud in the sale, the notice under the mortgage was technical, and after a quarter of a century such a bona fide sale that is without fraud should not be resurrected. Defendant under the sale went into possession of the land and has been in possession ever since. Under the facts and circumstances of this case, I think the principle and laches applies and this contest between blood-kin, a niece and uncle, should be forever buried.

The principle is well stated in McIntosh, N. C. Prac. and Proc., p. 103-4, as follows: "It does not follow that, because the statutes of limitations may bar a remedy in equity as at law, the court will grant equitable relief in every case where the statute has not barred. Laches, or unreasonable delay, independently of any statute of limitation, will prevent relief in equity, upon the principle that equity aids the diligent and not the slothful. When a claimant has slept on his rights until the rights of innocent third persons have intervened, or it would be otherwise inequitable to change the existing conditions, equitable relief may be denied, although the statute of limitations has not barred the claim. Conscience, good faith, and reasonable diligence are necessary to call forth the exercise of the peculiar powers of a court of equity. No particular rule can be given as to what will constitute laches; it must depend upon the circumstances of each case."

HELEN B. REDFERN v. WALTER M. McGRADY, J. M. WALLACE, AND I. G. WALLACE, PARTNERS, TRADING AND DOING BUSINESS AS WALLACE BROTHERS; MECKLENBURG FARMERS' FEDERATION (A CORPORATION), AND JAMES M. YANDLE, CLERK OF THE SUPERIOR COURT, MECKLENBURG COUNTY.

(Filed 2 July, 1930.)

1. **Mortgages H o—Statutory powers of clerk in regard to resale under mortgage are to be strictly complied with.**

The supervisory powers given the clerks of the Superior Courts by C. S., 2591, apply to sales and resales under the power of sale contained in mortgages and deeds of trust and not to ordinary judicial sales, and the statute must be strictly complied with.

2. **Same—Where no advance bid is made within ten days it is duty of clerk to order trustee to make deed to last and highest bidder at the sale.**

Where an advance bid is made for the resale of lands foreclosed under power of sale, it is the duty of the clerk upon receiving the deposit within the time prescribed to order a resale, and where such resale is made and no advance bid is made within ten days, to order the trustee or mortgagee to make conveyance to the purchaser upon his payment of the amount of his bid.

3. **Mortgages H n—In this case held: mortgagee waived right to deposit made by mortgagor to cover his advance bid for resale of property.**

Where the mortgagor of lands foreclosed under power of sale makes an advance bid within ten days from the date of the sale and makes the required deposit, and the clerk orders a resale, and the mortgagor becomes the last and highest bidder at the resale, and the trustee and *cestui que trust* give the mortgagor time within which to comply with the bid and the clerk does not issue an order for the trustee to make title to the purchaser in accordance with the mandatory provisions of the statute, and thereafter the trustee files a petition for the sale of the land: *Held,* upon the land failing to bring the amount of the mortgage debt at the sale ordered after the failure of the mortgagor to comply with his bid, the trustee and *cestui que trust* by treating the bid of the mortgagor as a nullity and by taking the matter out of the clerk's hands waived their lien on the amount deposited by the mortgagor for the resale, and the deposit in the clerk's hands is subject to attachment by the creditors of the mortgagor.

APPEAL by plaintiff from *Sink, Special Judge,* Special Term, 17 February, 1930, of MECKLENBURG. Affirmed.

This was an action brought by plaintiff to recover of the defendants the sum of $369.34. *The facts:* The defendant, Walter M. McGrady, on 1 February, 1926, executed and delivered to John A. McRae, trustee, a deed of trust on certain land to secure certain bonds due to plaintiff for $6,500. The deed of trust was duly registered. Default was made in the payment of the bonds and the trustee advertised the property under C. S., 2591. Several sales took place: (1) Sale on 17 October, 1927. Plaintiff Helen B. Redfern became the last and highest bidder in the sum of $6,700. Report of sale was duly made to the clerk by the trustee. In compliance with the statute within ten days, the defendant Walter M. McGrady, 22 October, 1927, deposited with Jas. M. Yandle, the clerk, advance bid of 5 per cent, $335. A resale was ordered on 22 October, 1927, to take place on 21 November, 1927, when Walter M. McGrady became the last and highest bidder in the sum of $7,035. Report of resale was duly made to the clerk by the trustee. On 30 November, 1927, H. B. Teeter deposited with the clerk 5 per cent advance bid, $351.25 ($351.75). A resale was ordered to take place on 19 December, 1927, when N. B. Teeter became the last and highest bidder in the sum of $7,386.75. Report of resale was duly made to the clerk by the trustee; on 29 December, 1927, Walter M. McGrady deposited with the clerk 5 per cent advance bid, *$369.34—amount sued for in this action.*

A resale was ordered on 3 March, 1928, and the land resold on 19 March, 1928, and Walter M. McGrady became the last and highest bidder in the sum of $7,756.08. McGrady offered to increase his bid 5 per cent within the ten days, but the clerk required a $1,000 bond, and nothing was done. McGrady promised to pay the plaintiff the amount of bid if she would give him time. Extensions were given from 19 March, 1928, to 1 September, 1928, when the plaintiff filed a petition before the clerk setting forth that McGrady had failed to comply with his bid and praying a resale. That "the said order also provided that notice be issued to the said Walter M. McGrady to show cause why his deposit of $369.34, as aforesaid, should not be applied upon the expenses of the several sales, trustee's commissions, etc." A resale was ordered to take place on 1 October, 1928, and plaintiff, Helen B. Redfern, became the last and highest bidder in the sum of $3,300. On 1 October, 1928, the report of sale was duly made to the clerk by the trustee. On 11 October, 1928, Walter M. McGrady deposited with the clerk 5 per cent advance bid, $165, and gave bond in the sum of $1,500 for the performance of his bid, as required by the clerk. A resale was ordered on 11 October, 1928, and the land resold on 19 November, 1928, and plaintiff, Helen B. Redfern, became the last and highest bidder at $6,500. The report of resale was duly made to the clerk by the trustee. A deed was duly made to her for the property upon order of the clerk. The property purchased at the last sale by plaintiff, Helen B. Redfern, after paying the expense of sale, was $926.10, less than her debt against Walter M. McGrady. On 1 April, 1929, the plaintiff, Helen B. Redfern, filed a petition setting forth the facts: "With regard to the default of the said McGrady in compliance with the terms of his bid, the deposit by the said McGrady of the said sum of $369.34 and all other pertinent facts with reference to the matter, praying that an order be issued to the said McGrady to show cause why the said sum should not be paid to her; that, an order was signed by the clerk of the court, on 1 April, 1929, directing the said McGrady to show cause on or before 15 April, 1929, why the said deposit of $369.34 should not be applied upon the balance of the indebtedness due by him to the said Helen B. Redfern on the said deed of trust."

On 26 March, 1929, the $369.34 which was credited on the books of the clerk as being due Walter M. McGrady was attached by the defendants, Wallace Bros. An attachment was also sued out by defendant, Mecklenburg Farmers Federation, a corporation, for indebtedness due them by Walter M. McGrady. Jas. M. Yandle, the clerk, in answer to the said notice and levy, on 29 March, 1929, filed answer, setting forth that he had the sum of $369.34, which amount was credited on his books as being due the said Walter M. McGrady.

Without notice to the plaintiff, Helen B. Redfern, or the trustee, and without making them parties, the case came on for trial in the Superior Court, and the court signed a judgment authorizing the clerk to pay the amount of $369.34 to the attaching creditors of McGrady.

The plaintiff contends that the $369.34 deposited by McGrady was "impressed with a trust for the performance of his said bid in connection with which the said deposit was made, that, said deposit was made as a guarantee of the performance by the said McGrady of his said bid, and by reason of the failure of said McGrady to perform his said bid as aforesaid, and the failure of the property upon the final sale to bring a sufficient amount to pay the indebtedness, secured by the said deed of trust, the said fund became the property of the said plaintiff, under and by virtue of the provisions of the statute under which said deposit was required to be made. . . . That the plaintiff and the said trustee were not parties to the said action in which the said clerk was served with notice of garnishment, and had no notice thereof, either actual or constructive; that, the payment of said funds by the said clerk to the said parties was wrong and unlawful; and that, the omission of the clerk to give to the court notice of all the facts pertaining to said deposit, was wrongful, unlawful and negligent. . . . That the said defendants, Jas. M. Yandle, Wallace Bros., and the Mecklenburg Farmers Federation, and each of them, were jointly and severally, negligent in failing to disclose to the court all the facts hereinbefore referred to; that, they were jointly and severally negligent in failing to give to the said plaintiff, and the said John A. McRae, trustee, and each of them, notice of the said actions. . . . Therefore, the plaintiff prays judgment against each of the defendants, and asks for relief in accordance with the law and the facts as hereinbefore set forth."

The defendants demurred that the complaint does not state facts sufficient to constitute a cause of action and set forth the grounds of the demurrer. Among the grounds, the following: "It is shown by the face of the complaint that the plaintiff's trustee abandoned his rights to enforce the said McGrady bid of 19 March, 1928, and voluntarily released the said McGrady from the compliance therewith, by making a new sale of the property described in the deed of trust, after four weeks advertisement thereof; and that, by such abandonment and release, and by his election to make a new sale, the plaintiff's trustee released any and all right he and/or the plaintiff may have had to the said deposit. It appears from the face of the complaint that, if the plaintiff ever had any lien, or trust impressed for her benefit, upon the deposit of $369.34 made by Walter M. McGrady on or about 29 December, 1927, that she surrendered and waived or released all her claim and rights thereto by her own conduct and by her agreements with the said Walter M. McGrady to extend the time within which he could comply with his bid at the sale of 19 March, 1928, such extensions of time having been repeatedly agreed to, until the plaintiff's trustee, following several defaults of the said McGrady to perform his agreements with the plaintiff, published a completely new notice of sale of the real estate described in the complaint, and conducted and held such new sale on 1 October, 1928." C. S., 511(6). The demurrer was sustained. Plaintiff excepted and assigned error and appealed to the Supreme Court.

Stewart, McRae & Bobbitt for plaintiff.

Pharr & Currie for Wallace Brothers and Mecklenburg Farmers Federation, Inc.

J. Lawrence Jones and J. L. DeLaney for Jas. M. Yandle, Clerk.

CLARKSON, J. It has been held by this Court that C. S., 2591, must be strictly complied with. The supervisory powers invested in the clerk of the court over sales under a mortgage, deed of trust, etc., are not an ordinary judicial sale, but confined by the statute to sales, and resales under the power of sale contained in the instruments, and in accordance with the directions of the statute. *Lawrence v. Beck,* 185 N. C., 196.

The facts are to the effect: That the advance bid deposited by Walter M. McGrady was $369.34, the amount plaintiff sued for in this action. In compliance with the statute, on 3 March, 1928, a resale was ordered, under C. S., 2591, and the land sold on 19 March, 1928, and Walter M. McGrady was the last and highest bidder in the sum of $7,756.08. No advance bid in ten days from the date of sale, as was required by the statute, was deposited with the clerk, therefore Walter M. McGrady was entitled to have title made to him for the property on complying with the terms of sale, and it was the duty of the clerk to issue an order and require the trustee to make title to purchaser. This was not done. The trustee, with the consent of the plaintiff, took the matter from out of the clerk's jurisdiction under C. S., 2591, gave McGrady time and nothing was done from the date of resale, 19 March, 1928, when McGrady was the last and highest bidder for the property, until 1 September, 1928. C. S., 2591, *supra,* says (1) "If in ten days from the date of sale the sale price is increased, etc., . . . shall reopen the sale of said property and advertise the same," etc. (2) "Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate." The ten days elapsed and no upset bid was put on the property, therefore McGrady became the purchaser. The statute further provides, (3) "Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person and require him to make title to the purchaser." This mandatory provision was entirely ignored. A petition by the trustee was filed 1 September, 1928, before the clerk asking for a sale, not a resale, of the property and the land was ordered to be advertised and sold on 1 October, 1928. At this sale the plaintiff Helen B. Redfern became the last and highest bidder in the sum of $3,300. Report of sale was duly made to the clerk by the trustee. On 11 October, 1928, Walter M. McGrady deposited with the clerk 5 per cent advance bid—$165.00, and gave bond in the sum of $1,500 for the performance of his bid, as required by the clerk, and on that date a resale was ordered and the land resold on 19 November, 1928, and the plaintiff became the last and highest bidder at $6,500. A report was duly made to the clerk by the trustee and deed duly made to the plaintiff by the trustee by order of the clerk. On this sale the property brought $926.10 less than plaintiff's debt and expenses. Plaintiff contends that the deposit of McGrady of $369.34 on 29 December, 1927, should be applied on her debt.

We think, from the entire record, that plaintiff waived and abandoned her claim to the $369.34. Walter M. McGrady was the last and highest bidder for the land in the sum of $7,756.08. No upset bid within the ten days was deposited with the clerk as required by C. S., 2591, *supra.* This was a final sale, and under the act it was mandatory on the clerk to issue an order to the trustee and require him to make title to the purchaser. This was not done. If the purchaser had refused to comply with his bid, the $369.34 would have been applied to plaintiff's debt if the land did not bring over his bid on a resale properly held under the statute.

In *Harris v. Trust Co.,* 198 N. C., at p. 610, it is said: "We think the claim of Joel T. Cheatham cannot be sustained. The money deposited by B. Frank Harris, under the statute, was a guarantee that there would be no loss occasioned if he be declared the purchaser at the resale; he was so declared and did not comply, but there was no loss, as the property brought more on resale."

In the *Harris case* the statute was strictly complied with. A deed was tendered Harris and he refused to pay for the land, and on a resale it brought over the debt due by Harris to Cheatham, the holder of the notes secured by the deed of trust. In the present case to have held the $369.34 as a guarantee, the statute must be strictly complied with. The rights of plaintiff are statutory, not equitable.

The plaintiff is to be sympathized with, as she and her trustee were trying not to be harsh and by kindly treatment lost her statutory rights by not strictly following them. We must adhere to the law as written.

In *Cherry v. Gilliam,* 195 N. C., at p. 234-5, citing numerous authorities, it is said: "It is provided in section 2591 that in the foreclosure of the mortgages the sale shall not be deemed to be closed under ten days, and if within this time an increased bid is paid to the clerk the mortgagee, by order of the clerk, shall reopen the sale, advertise the property as in the first instance, and make a resale; and that upon the final sale the clerk shall issue an order to the mortgagee to make title to the purchaser. It has been held with respect to this statute that it was enacted for the protection of the mortgagees when sales are made under a power of sale without a decree of foreclosure by the court; that it confers no power on the clerk to make any orders unless the bid is increased; that in the absence of such bid no report is necessary, and that if an increased bid is paid, the clerk cannot make any orders until the expiration of ten days." *In re Bauguess,* 196 N. C., 278; *Hannah v. Mortgage Co.,* 197 N. C., at p. 187.

Plaintiff and her trustee treated the bid of McGrady as a nullity. The clerk did not order the trustee to make title, and the trustee did not comply with the statute and tender a deed to McGrady. Not complying with the statute, the plaintiff lost what benefit she may have derived from the money deposited. The trustee started a new sale and the 19 March, 1928, resale was abandoned. The petition to the clerk to give notice to McGrady was without authority under C. S., 2591. In fact, after the final sale to McGrady on 19 March, 1928, the new sale was started on 1 October, 1928, some six months after the final sale to McGrady; the subsequent bid of McGrady and his making deposit and putting up bond and the resale in which plaintiff became the purchaser was a complete disaffirmance by McGrady and the plaintiff of the resale of 19 March, 1928, which the $369.34 was deposited with the clerk to protect. All these acts and conduct, as a matter of law, constitute a waiver and abandonment of the resale of 19 March, 1928, under C. S., 2591, which the $369.34 was deposited to protect. Plaintiff or the trustee had no lien or trust right in the fund of $369.34, under the facts and circumstances of this case. It was the property of McGrady and subject to attachment. To have a lien or trust right in the guarantee deposit on a resale, under C. S., 2591, the statute must be strictly complied with.

The court below was correct in sustaining the demurrers.

Affirmed.

STATE v. JOHN L. HEATH AND HOWARD A. HEATH.

(Filed 2 July, 1930.)

1. **Statutes B a—Penal statutes will be strictly construed.**

   A penal statute must be strictly construed in favor of the one charged with the offense it has created, and it will not be enlarged by construction to include offenses not clearly described, and all doubt will be resolved in favor of the defendant.

2. **Corporations D f—Agreement in this case held not to be within intent and meaning of the "Blue Sky" law.**

   The "Blue Sky" law of the State enacted for the protection of investors in preventing the promotion of "wild-cat" schemes, chapter 71(A), N. C. Code of 1927, applies where money is invested in stock, securities, profit-sharing agreements, etc., with the purpose of securing an income from the employment of the money, and a contract whereby the owner of a copyright system gives the exclusive right to another to operate the system in certain counties, and in return is to receive a percentage of the gross receipts from the operation of the system, with further provision for a division of net profits from sales or contracts written by either party, does not contemplate the placing of money in a way to secure an income from its employment, but the earning of a portion of the gross receipts in return for individual services, and the agreement is not a profit-sharing scheme or investment contract within the intent and meaning of the statute.

APPEAL by State from *Lyon, Emergency Judge,* at February Special Term, 1930, of ROBESON.

Separate bills of indictment were found against the defendants, and at the trial the two actions were consolidated and tried together. The indictments charged the defendants with unlawfully, wilfully, and feloniously offering for sale, selling, and causing to be sold to Ed. B. Freeman a certain certificate of interest in a profit-sharing agreement, or investment contract, without first registering the same in accordance with the provisions of law.

The jury returned the following special verdict:

1. On 20 January, 1928, the defendants entered into a written contract with Ed. B. Freeman, of the county of Robeson, which is attached as Exhibit "A."

2. A copy of the copyright mentioned in the contract (Exhibit "A") is hereto attached, marked Exhibit "B."

3. Ed. B. Freeman complied with the contract on his part.

4. No application was made by the defendants or either of them, pursuant to the "Capital Issues Law," Consolidated Statutes, chapter 71A, for the registration of the securities sold by the defendants to Ed. B. Freeman, and the defendants made no application for license as dealers or salesmen under the said Capital Issues Law, and no order of regis-

tration for the security was issued by the Securities Department, and no license was issued to either of the defendants as a salesman or as a dealer.

If, upon these facts, the court be of the opinion that the defendants, or either of them, are guilty, the jury so finds; otherwise, not guilty.

The court expressed the opinion that upon the facts thus found the defendants should be acquitted, and the jury returned a verdict of not guilty.

Exhibit A is a contract between John L. Heath, J. Cecil Heath, J. Talton Heath, and Howard A. Heath, partners doing business under the name of Heath Brothers Realty Transfer System of Guilford County, and Ed. B. Freeman, of Robeson County.

The partners have a copyright on their system for the first term of twenty-eight years from 8 May, 1924, and contracted that Freeman should have the exclusive use of their system in the counties of Robeson, Columbus, Bladen, Hoke, and Scotland, in consideration of $3,500, to be paid in installments.

The remainder of the contract follows, the partners being the parties of the first part, and Ed. B. Freeman the party of the second part:

"It is further agreed that the party of the second part shall work or cause to be worked in the counties mentioned above the Heath Brothers Realty Transfer System and to receive 80 per cent of the gross receipts charged for this service whether collected through listing fees or one per cent commission, and Heath Brothers Realty Transfer System to receive the remaining 20 per cent to be paid to the parties of the first part monthly.

It is further agreed that the party of the second part will pay all expenses incurred by the operation of the above system, except 20 per cent of advertising incurred for advertising said system, which will be paid by the party of the first part.

It is further agreed that Heath Brothers Realty Transfer System will assist the party of the second part in getting the above named business organized and put in working condition.

It is further agreed that the party of the second part will mail to all real estate dealers a copy of descriptions of all lands listed in the counties mentioned above by the party of the second part, together with a copy of same to the home office of the parties of the first part at Greensboro, N. C.

It is further agreed that the duration of this contract shall be for the remaining period of the copyright under which the parties of the first part are operating, and that the party of the second part or his heirs or assigns shall have the privilege of renewing said contract under the same conditions as this contract is made.

It is further agreed that the party of the second part or his assigns shall have the right to sell or dispose of this contract or any part thereof subject to the approval of the parties of the first part.

Parties of the first part agree to pay to the party of the second part 50 per cent of all net profits that may be obtained from auction sales conducted or contracts written or caused to be written by either of the parties above mentioned in the above-mentioned counties."

Attorney-General Brummitt, Assistant Attorney-General Nash and I. M. Bailey for the State.

Norma Janet Winburn for defendants.

Adams, J. The defendants were indicted for selling to Ed. B. Freeman "a certain certificate of interest in a profit-sharing agreement, or investment contract, without first having registered the same in accord with the provisions of law." The law regulating the sale of securities is contained in chapter 149 of the Public Laws of 1927, and in chapter 71A of the North Carolina Code of 1927.

One of the penal subsections is as follows: "Whoever shall sell or cause to be sold, or offer to sell or cause to be offered for sale, any security in this State, which is not exempt under any of the provisions of section 3 (Michie's Code, 3924(l), unless sold in any transaction exempt under any of the provisions of section 4 (Michie's Code, 3924(m), and which such securities so sold or caused to be sold or so offered for sale or caused to be offered for sale, shall not have been registered as provided in this act, shall be guilty of a violation of the act, and upon conviction thereof shall be imprisoned in the State prison for a period of not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both." Laws 1927, ch. 149, sec. 23(b); Michie's Code, sec. 3924(ff) (b).

"Security" is defined in section 2 (Michie's Code, 3924(k)(c): "The term 'securities' or 'security' shall include any note, stock certificate, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate or interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in any oil, gas or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits or any other investment commonly known as security."

In section 9 (Michie's Code, 3924(r) it is provided that "all securities required by this act to be registered before being sold in this State, and not entitled to registration by notification, shall be registered only by qualification in the manner provided by this section."

The term "sale" includes any agreement whereby a person transfers or agrees to transfer either the ownership of or an interest in a security. "Sale" or "sell" includes also an attempt to sell, an option of purchase or sale, a subscription, or an offer to sell either directly or by an agent, or by a circular letter, advertisement, or otherwise." Section 2(d); Michie's Code, 3924(k)(d).

It is to be noted that although the statute gives the word "security" a comprehensive definition, the indictment directs our inquiry to the question whether the paper executed by the parties is an "investment contract," or a "certificate of interest in a profit-sharing agreement." There is no contention that the paper referred to was registered or that it is within any of the exempted classes.

If a person shall sell any security "embraced and referred to" in the act without having it registered as therein provided, he shall be deemed guilty of a felony. The statute containing this provision is penal. That penal statutes must be construed strictly is a fundamental rule. The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant. *S. v. Kearney,* 8 N. C., 53; *Smithwick v. Williams,* 30 N. C., 268; *Hines v. R. R.,* 95 N. C., 434; *Cox v. R. R.,* 148 N. C., 459.

"Blue Sky" laws have been upheld by the appellate court of this and other States and by the Supreme Court of the United States. *S. v. Agey,* 171 N. C., 831; *B. & L. Asso. v. Coffman,* 162 S. W. (Ark.), 1090; *Ex parte Taylor,* 66 So. (Fla.), 292; *Hall v. Geiger-Jones Co.,* 242 U. S., 539, 61 Law Ed., 480; *Caldwell v. Sioux Falls Stock Yards Co.,* 242 U. S., 559, 61 Law Ed., 493; *Merrick v. Halsey & Co.,* 242 U. S., 568, 61 Law Ed., 498.

The validity of the statute granted, the defendants cannot be convicted unless their conduct involved a breach of the letter and spirit of the law. The purpose of the law as pointed out in *Hall v. Geiger-Jones Company, supra,* is "to protect the public against the imposition of unsubstantial schemes and the securities based upon them." One of the securities mentioned in the indictment is an "investment contract." The term is not defined in the act, but it implies the apprehension of an investment as well as of a contract. The word "investment" has no technical definition and its meaning in particular cases is often determined by its relation to the context. It has been variously defined as the conversion of money into property from which a profit is to be derived in the ordinary course of trade or business; an expenditure for profits; the placing of capital to secure an income from its use. We have found comparatively few cases in which the meaning of "investment contract" has been given. In *S. v. Gopher Tire and Rubber Co.,* 177 N. W. (Minn.), 937, the

Supreme Court of Minnesota in analyzing a statute denouncing "investment contracts" said: "The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment as that word is commonly used and understood; and that if the defendants sold its certificates to purchasers who paid their money justly expecting to receive an income or profit from the investment, it would seem that the statute should apply." The certificate set out in that case recited this provision: "That defendant will annually set aside as a bonus to certificate holders all of its excess earnings after paying operating expenses, fixed charges, and dividends to stockholders, the same to be distributed at its option in the form of preferred stock."

The definition of "investment contract" in the case just cited, was adhered to in *S. v. Evans,* 191 N. W. (Minn.), 425, in which the contract gave to the purchaser an option to surrender his contract and take back the money he had paid, with a bonus of $70 for each $1,000, from the profits obtained on the sale of contracts. It was adhered to in *S. v. Ogden,* 191 N. W., 916, in which the "unit holders" were to participate in profits in proportion to their holdings, and in *S. v. Bushard,* 205 N. W., 370, the defendant was to participate in profits as the result of his investment and eventually to receive certificates of corporate stock.

In *S. v. Agey,* 171 N. C., 831, decided in 1916, the Court construed the statute then in effect. There the defendant was the agent of a Tennessee corporation engaged in selling tracts of land in Georgia for fig orchards. The purchaser paid in installments and the company reserved title, promising to convey to the purchaser when the last payment was made. The company was to cultivate, prune, and take care of the orchard for five years. The purchaser took no part in it. It was held that the corporation was an "investment" company, that the defendant was offering for sale the "obligation of a foreign corporation," and "evidences of property" in violation of the law as it then existed. In other cases the question before the Court was the fraudulent sale of stocks or bonds. *Bank v. Felton,* 188 N. C., 384; *S. v. Deposit Co.,* 191 N. C., 643; *Hotel Corporation v. Bell,* 192 N. C., 621.

The distinguishing features of the contract in question are apparent. Freeman was to get his income from the gross amount received for his individual service in working the transfer system in those counties in which he was to have the benefit of its exclusive use. The fact that he was to retain only a percentage of the gross receipts does not affect the nature or quality of the service. This applies also to the provision that the company should pay Freeman one-half of the net profits derived from auction sales or contracts written by either of the parties. The contract does not contemplate the placing of Freeman's money with the partners in a way intended to secure an income from its employment by them in the conduct of the business.

The result is obvious. In our opinion the contract included in the special verdict is not an "investment contract" within the terms of the statute upon which the indictment is drafted. And by the same reasoning we are led to the conclusion that the contract is not a "certificate of interest in a profit-sharing agreement."

The evils which the Legislature intended to denounce are speculative schemes which have no basis. It was deemed necessary to supervise the efforts of organizers and promoters who offer to sell stocks, bonds, and other securities in person or by agents; and to save investors from laying out their money in securities upon the promise and just expectation that the investment would return a profit without any active effort on the part of the investors. *S. v. Agey, supra; Bank v. Felton, supra; S. v. Deposit Co., supra; Hotel Co. v. Bell, supra; Lewis v. Creasy Corporation,* 248 N. W., 1046; *Creasy Corporation v. Enz. Bros. Co.,* 187 N. W., 666. It appears from the contract under consideration that the anticipated profits were dependent chiefly upon the efforts of Freeman, and this, as indicated above, is its distinguishing characteristic.

Whether a part interest in a copyright is subject to sale for the exclusive use of the purchaser we need not decide.

No error.

W. G. PENLAND, UTE HYATT, W. T. JENKINS, JOHN MILLER, L. J. MOODY, R. O. MARTIN, ROBERT LEE, Z. D. BLANKENSHIP, VARNAL GRANT, J. R. JENKINS, JAKE ELLIOTT, R. M. WALDROP, W. M. DEHART, H. T. JENKINS, T. N. DAVIS, A. H. HUGHES, W. C. RANDALL, G. E. BLANKENSHIP, J. H. WILSON, R. D. ESTES, M. P. CUNNINGHAM, CARL LEE, THAD GREEN, J. B. BLANKENSHIP, LEE BIRCHFIELD, C. R. SHOOK, J. C. GARLAND, BOB WIGGINS, J. A. GIBSON, H. T. BRANTON, ANSELL HALL, JAKE RANDOLPH, W. H. SHULER, AND ALL OTHER CITIZENS AND TAXPAYERS RESIDING OR OWNING PROPERTY IN THAT PARTICULAR BOUNDARY OR TERRITORY HEREINAFTER DESCRIBED AS THE BOUNDARY ATTEMPTED TO BE ANNEXED TO THE ORIGINAL TOWN LIMITS OF THE TOWN OF BRYSON CITY WHO WILL COME IN, MAKE THEMSELVES PARTIES, AND CONTRIBUTE TO THE EXPENSE OF THIS ACTION, v. THE TOWN OF BRYSON CITY, E. C. BRYSON, MAYOR OF THE TOWN OF BRYSON CITY, S. W. BLACK, A. M. BENNETT AND R. Q. WOODY, COMPOSING THE BOARD OF ALDERMEN OF SAID TOWN OF BRYSON CITY, AND D. T. CRISP, TAX COLLECTOR OF SAID TOWN OF BRYSON CITY.

(Filed 2 July, 1930.)

1. **Statutes A a—Where original act incorporating a town is passed according to Article II, sec. 14, it is not required that act enlarging its boundaries be passed thereunder.**

Where an act incorporating a town has been passed by the Legislature in conformity with the provisions of our Constitution, Art. II, sec. 14, and at a subsequent session an act to submit the question of enlarging the boundaries of the town to the electorate of the town is also passed in conformity therewith, and an act is later passed at the same session of the Legislature to make the description more definite and to some extent adding a little more territory beyond the later boundaries, each act including the original boundaries of the town, it is not necessary that the last act be passed in accordance with Art. II, sec. 14, and an election thereunder is properly authorized.

2. **Elections B a—Error in statute appointing date for election held patent and immaterial and validity of election not affected thereby.**

Where a statute directs that an election be held by the voters of a municipality on a certain day of the week, 18 April, and that day of the week is the 19th, and the election is accordingly had on the 19th: *Held*, the error in the statute is patent upon its face and too technical to declare the election held thereunder invalid on that account.

3. **Elections I d—Where it does not appear that result of election was affected by irregularities the election will be upheld.**

Where an election to determine the choice of the voters of a town for or against enlarging its boundaries is required to be held under the Australian Ballot System, and it appears that the law was not strictly enforced, the result of the election will not be declared invalid by the courts on that account if it appears that the voters had freely voted their choice, without influence from others at the poll, and that there was "a free ballot and a fair count."

4. **Elections I a—In order to set aside an election it must appear that action was brought with due diligence and in good faith.**

In order for the taxpayers of a municipality to set aside the result of an election therein, it is required that they must not unduly delay their action for that purpose, and it must appear that the rights of innocent parties have not intervened, and that the action was brought in good faith, with reasonable diligence, and sets forth a substantial cause, or the action will be dismissed.

APPEAL by plaintiffs from *Schenck, J.,* and a jury, at October-November Term, 1929, of SWAIN. No error.

This is a civil action brought by the plaintiffs against the defendants for the purpose of having chapter 67 of the Private Laws of the General Assembly of North Carolina passed at the session of 1927, and chapter 215, Private Laws of the General Assembly of North Carolina, session 1927, declared unconstitutional and void, and an election held under said acts attempting to enlarge the town limits of the town of Bryson City declared null and void, and for a permanent injunction enjoining the defendants from collecting town taxes within the territory described in the complaint in this action.

At the close of all the evidence defendants renewed their motion theretofore made at the close of plaintiff's evidence to dismiss the action and for judgment as of nonsuit. Motion denied; defendants excepted. Upon the conclusion of all the evidence, and following the ruling of the court for judgment as of nonsuit, the parties, plaintiffs and defendants, agreed that the issues theretofore tendered by the court, should be answered as appears in the record, as if answered by the jury, and upon said issues being so answered defendants tendered to the court the following judgment, which the court signed:

"This cause coming on for hearing at this the October Term, 1929, of Swain County Superior Court before Honorable Michael Schenck, judge presiding, and a jury, and same being heard upon the following issues, to wit:

1. On what day was the election mentioned in the several acts set forth in the pleadings called and held? Answer: Tuesday, the 19th day of April, 1927.

2. Did the ballots furnished and voted at said election have printed upon them 'Official ballot on City Proposition, City of Bryson City,' and bear the fac simile of the city clerk? If not, what was printed on said ballots? Answer: No, there was printed on such ballots the following words and figures, to wit: '( ) For Ratification. ( ) Against Ratification.'

3. Were booths, or a booth, furnished to be used by the voters in marking their ballots? Answer: No.

4. Were there adjoining rooms to the court room, where the election was held, that could be used as a place for marking tickets, and if so, how many? Answer: Yes, two such rooms.

5. Were guard rails placed around the polling place and ballot boxes? Answer: No, except the bar rail of the court room.

6. Were persons admitted or allowed by the election officials about the ballot boxes while voters were casting their votes, other than the voters and election officials? Answer: Yes.

7. Were two watchers appointed by the city governing body of judges of election to attend the polling place to assist the voters? Answer: Yes.

8. Were persons permitted or allowed to electioneer by the election officers in the court room where said election was being held about the polling place and was such electioneering carried on during the time when the ballots were being cast at said election? Answer: No.

9. Does the description of land included in section 1, chapter 215, Private Laws of 1927, include land not included in the description of land set forth in section 1 of chapter 67, Private Laws of 1927? Answer: Yes.

10. Were any of the voters, who voted in the election held 19 April, 1927, in the town of Bryson City, interfered with or prevented from voting a free ballot, and if so, how many? Answer: No.

That after all the evidence, which had been offered by the plaintiffs and the defendants, counsel representing the plaintiffs and defendants agreed that said issues should be answered by the jury as set forth above.

That all the aforesaid issues were answered, by consent of the parties, plaintiffs and defendants, through their attorneys, with the same force and validity as if the jury empaneled in said cause had answered same. And the court being of the opinion that the election in question, held on 19 April, 1927, in the town of Bryson City, was in all respects valid: It is, therefore, on motion of Edwards & Leatherwood, counsel for defendants, considered, ordered, adjudged and decreed that the plaintiffs take and recover nothing by this action, and that the same be dismissed; that the restraining order heretofore issued by the court be, and the same is hereby, in all respects, dissolved, and that the defendants have and recover of the plaintiffs their cost in this action to be taxed by the clerk of this court."

To the signing of the foregoing judgment the plaintiffs excepted and assigned error. Plaintiffs tendered judgment, the court below refused to sign same and plaintiffs excepted, assigned error and appealed to the Supreme Court.

The other facts will be set forth in the opinion.

Moody & Hall for plaintiffs.
Edwards & Leatherwood for defendants.

CLARKSON, J. The General Assembly of North Carolina passed an act to incorporate the town of Charleston in Swain County, N. C. It was passed in accordance with Article II, section 14, of the Constitution of North Carolina, and ratified 3 February, 1887, chapter 11, Private Laws of North Carolina, 1887. In 1889 the name was changed by the General Assembly from Charleston to Bryson City. Chapter 4, Private Laws 1889. The original size of the old town was around 500 acres—"one-half mile from the courthouse in all directions." An act was passed by the General Assembly of North Carolina to enlarge the corporate limits of the town of Bryson City, and to provide for an election. Chapter 67, Private Laws of 1927. The enlarged town comprises about 2,600 acres. This act was passed in accordance with Article II, section 14, of the Constitution. This act said: "That the corporate limits of the town of Bryson City, Swain County, formerly Charleston, as defined by section 2 of chapter 11, Private Laws of one thousand eight hundred and eighty-seven, be and the same are hereby amended so as to include all of the territory and property within the following boundary (describing same)." This act included the old boundaries.

After the passage of the above act, at the same session another act was passed to correct the boundaries, chapter 215, Private Laws of 1927, by striking out the description of the boundary in the former act and inserting in lieu thereof a new description, but the description in both acts included the old town limits. The description in the latter took in a little more territory. Section 3, chapter 67, of 1927 act, *supra,* provides that *"said election shall be held and conducted as near as may be as other general elections,* and *the same shall be held on Tuesday, 18 April, 1927";* that at the time said election was held all elections held in the county of Swain, including county, town and municipal elections, were required to be held under the Australian Ballot System as provided by chapter 606, Public-Local Laws, enacted by the General Assembly of North Carolina, at its session of 1917, entitled An act to provide the Australian Ballot, said act being amended by chapter 175, Public-Local Laws of 1921, by adding the word "Swain" after the word "Henderson," and before the word "and" in line 2 of section 43A, chapter 606.

Chapter 67 of the Private Laws of 1927, above, authorized the board of aldermen of the town of Bryson City to call an election for the purpose of submitting to the qualified voters residing within the boundary the question of acceptance or rejection of the provisions of the act, and that the same shall be held on Tuesday, 18 April, 1927. Also provided for the appointment of a registrar and two judges to hold said election, and provided for the kind of ballots to be prepared by the election officials. The board of aldermen of said town, pursuant to said act of the General Assembly, called said election to be held at the courthouse in Bryson City on Tuesday, 19 April, 1927, and pursuant to said act and said notice said election was held on Tuesday, 19 April, with the following result: 'Total number of registered voters as shown by poll-book, 602; total number of votes cast, 547; total number for ratification, 317; total number against ratification, 230.'" The governing body of said town gave notice of result and declared that the said act of the General Assembly so ratified declared to be in effect from the said date.

The plaintiffs contend (1) that chapter 215 of the Private Laws of 1927, the act to correct the boundaries, is unconstitutional, in that same was not passed in accordance with Article II, section 14, of the Constitution of North Carolina. We cannot so hold under the facts and circumstances of this case. (2) The plaintiffs contend that the election held pursuant to chapter 67 of the Private Laws of 1927 was invalid. We cannot so hold.

In regard to the *first* proposition: The facts are to the effect that the town of Charleston was incorporated by the General Assembly of 1887. This act was passed in compliance with Article II, section 14, Constitution of North Carolina, the boundaries of the town included about 500 acres. The General Assembly of 1889 changed the name to Bryson City. The General Assembly of 1927 passed the act to enlarge the boundaries to about 2,600 acres. This act was passed in compliance with Article II, section 14, Constitution of North Carolina. This act struck out the section in reference to the boundaries which were set out in the act incorporating the town in 1887, and inserted in lieu thereof the new boundaries, which included the old boundaries, making the new boundaries about 2,600 acres. Later on in the session chapter 215, Private Laws of 1927, was passed to correct the prior act of the session by striking out the section that had described the boundaries and inserting in lieu thereof a new description which included the old boundaries of 500 acres and practically the new boundary, slightly changing the description in the act passed at the same session, which was passed in compliance with Article II, section 14, Constitution of North Carolina, making about 2,600 acres.

We think this exact question has been passed on in *Lutterloh v. Fayetteville,* 149 N. C., 65, and it is there held: When a municipal charter has been passed in accordance with Article II, section 14, of the Constitution requiring the aye and no vote to be taken on the three several days, it is not necessary for an act annexing territory thereto to be passed in like manner to confer authority for the levying of taxes within the territory annexed. At page 69 it is said: "Another and final objection made to the act of annexation is, that the object sought to be accomplished by it, in the mode provided, is beyond the power of the General Assembly, because it authorizes annexation, and consequently, taxation, without the consent of those who are affected by it. We have held in common with all the courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion. *Dorsey v. Henderson,* and *Perry v. Commissioners,* at this term; *Manly v. Raleigh,* 57 N. C., 372. Consequently, it follows that the enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restrictions, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety or justice we have naught to do." *Cotton Mills v. Waxhaw,* 130 N. C., 293; *Commissioners v. Commissioners,* 157 N. C., 515; *Reed v. Engineering Co.,* 188 N. C., 39; *State v. Jennette,* 190 N. C., 96; *O'Neal* *v. Mann,* 193 N. C., at p. 161; *Hailey v. Winston-Salem,* 196 N. C., 17; *Holmes v. Fayetteville,* 197 N. C., at p. 746.

It will be noted that under the *Lutterloh case, supra,* as the original act passed in 1887 was in compliance with Constitution of North Carolina, Article II, section 14, the extension acts of 1927 need not comply with Article II, section 14. Both the acts of 1927 that extended the boundaries had in them the original boundaries as contained in the act of 1887, incorporating the municipality. The striking out of the original boundaries in the act of 1887 and substituting in lieu the new boundaries in the acts of 1927, which included the boundaries as set forth in the act of 1887, was an immaterial change. It can be readily seen that the change was merely to make a simpler description of the boundaries of the old and new territory, there was no repeal of the old town limits. We cite below certain decisions of this Court in regard to material and immaterial changes:

In *Brown v. Commissioners,* 173 N. C., at p. 599, it is said: "It is admitted the bill passed the Senate in accord with the Constitution, but it was amended, and the amendment was concurred in by the House without recording the ayes and noes. It was not necessary that the House observe the constitutional requirement in concurring in the Senate amendment, as it was immaterial and consisted only in striking out the name of one commissioner and substituting another. The amendment did not broaden the scope of the act or affect its financial features. *Glenn v. Wray,* 126 N. C., 730; *Brown v. Stewart,* 134 N. C., 357."

In *Claywell v. Commissioners,* 173 N. C., at p. 659, we find the following: "It is the accepted position that when a material amendment is made to a bill of this kind, one coming under this constitutional provision, the required readings and entries on the journal shall be taken anew on the bill as amended. *Cottrell v. Lenoir, ante,* 138; *Cotton Mills v. Waxhaw,* 130 N. C., 293; *Glenn v. Wray,* 126 N. C., 730."

In *Road Commissioners v. Commissioners,* 178 N. C., at p. 65, we find: "But we are of opinion that an amendment of the kind presented here, which purports to change the method of maintaining a separate township road system from a bond issue restricted in amount to current taxation from year to year, indefinite as to time, might, in its practical application, work such a change in the burdens imposed that it could, in no sense, be regarded as immaterial within the meaning of the principle, and must be set aside because it was not passed with the formalities required by the organic law. *Bennett v. Commissioners,* 173 N. C., 625." *Russell v. Troy,* 159 N. C., 366.

In *Person v. Doughton,* 186 N. C., at p. 725, it is said: "Again, the courts will not adjudge legislative acts invalid unless their violation of the Constitution be clear, complete and unmistakable. *Bonitz v. School*

Trustees, 154 N. C., 379; *Coble v. Commissioners,* 184 N. C., p. 348. Speaking to this question in a recent case, *Adkins v. Children's Hospital,* 67 L. Ed., 440, the United States Supreme Court said: 'The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity; and that determination must be given great weight. This Court, by an unbroken line of decisions from *Chief Justice Marshall* to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.'" *Gunter v. Sanford,* 186 N. C., 452; *Long v. Rockingham,* 187 N. C., 199; *Reed v. Engineering Co.,* 188 N. C., 39; *Hinton v. State Treasurer,* 193 N. C., 496; *Queen v. Commissioners,* 193 N. C., 821.

In *Ogden v. Saunders,* 12 Wheaton, 213, it is held: "That no act should be held unconstitutional unless it is clearly so, beyond a reasonable doubt."

In regard to the *second* proposition: The issues as set forth in the statement of case were answered by consent of the parties to this controversy the same as by a jury. It will be noted that the act provides that the election shall be held on *Tuesday, 18 April,* the act indicating that Tuesday was the 18th, whereas Tuesday was in fact the 19th. This is such a patent error in the bill that it would be too technical to hold that it was material. *Commissioners v. Malone,* 179 N. C., 10; *Flake v. Commissioners,* 192 N. C., 590; 9 R. C. L., p. 998; 20 C. J., p. 102, note 5. Plaintiffs further contend that said election should not be upheld upon the ground that it was not held in strict compliance with the provisions of the Australian Ballot Law applicable to the county of Swain. Section 3 of chapter 67 of the Laws of 1927, provides, among other things: "That said election shall be held and conducted as near as may be as other general elections, and the same shall be held on Tuesday, 18 April, 1927. The board of aldermen at the meeting calling said election shall appoint a registrar and two judges to hold said election. The registrar shall open the registration books and make a new registration of the qualified voters residing within said boundary in accordance with the general election laws. The board of aldermen shall cause to be prepared ballots for said election on which shall be printed the words 'For Ratification' and 'Against Ratification.' Opposite each shall be blank squares; the voter shall indicate by an X in one of the squares for which he desires to vote. If a majority of those voting at said election shall vote for ratification, then this act shall immediately go into effect."

Flake v. Commissioners, 192 N. C., at p. 593, we think disposes of this contention: "If a statute simply provides that certain things shall be done within a particular time or in a certain way, and does not declare that their performance is essential to the validity of the election, they will be regarded as mandatory if they affect the merits of the election and directory if they do not. McCrary on Elections (3 ed.), sec. 190, cited with approval in *Hill v. Skinner,* 169 N. C., 405."

In *Hill v. Skinner,* 169 N. C., at p. 412, it is held: "The ultimate conclusions from the authorities is thus stated in A. & E. Enc. (2 ed.), at pp. 755, 767: The general principles to be drawn from the authorities are, that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid an election, unless they affect the result, or at least render it uncertain. But if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, and there are matters of substance that render the result uncertain, or whether they are fraudulent and the result is made doubtful thereby, the returns should be set aside." *Woodall v. Highway Commission,* 176 N. C., 378; *Riddle v. Cumberland,* 180 N. C., 321; *Plott v. Commissioners,* 187 N. C., 125; *Flake v. Commissioners,* 192 N. C., 590; *Montieth v. Commissioners,* 195 N. C., at p. 75-6.

Plaintiff also contends that the election is void on the ground that the voters were not given an opportunity to cast a secret ballot. In *Withers v. Commissioners,* 196 N. C., at p. 537, it is said: "Furthermore, the constitutional provision was intended and designed for the *protection of the voter himself in drawing about him, if he so desired,* the impenetrable veil of secrecy."

From the answers to the issues we think that plaintiffs cannot complain. It appears that there was a "free ballot and a fair count." The election was held in substantial compliance with the statutes. In fact, all the plaintiffs who testified voted "against ratification," but lost. The election was held on 19 April, 1927, and this action was instituted over two years after, on 20 May, 1929.

It is well said in *Jones v. Commissioners,* 107 N. C., at p. 256-7: "But the Court will not grant its aid, so invoked, unless it appears that the plaintiffs have been reasonably diligent—this depending upon the facts and circumstances of the case—in bringing their action. Especially it will not, where they have negligently delayed to bring their action until the rights of innocent parties have accrued. Nor will the courts tolerate, much less encourage, merely captious or vexatious interference with such elections. It must appear that the action was prompted by good faith, reasonable diligence and a substantial cause of action. Otherwise, the plaintiffs cannot have the relief they demand,

and the action will be dismissed. Their right to sue does not depend at all upon the statute of limitation, but upon the application of plain principles of equity, which require that a party seeking relief must, before he is entitled to have the same, do, as to the matter in question, what, in justice, fairness and good conscience he should have done on his part. In cases like the present one, unless such constituent equitable element appears, no sufficient cause of action is alleged."

In the judgment of the court below, we find

No error.

F. B. INGLE v. GAY GREEN.

(Filed 2 July, 1930.)

Judgments L a—Judgment of nonsuit will not operate as bar to subsequent action where the allegations are not substantially identical.

Where an action upon a contract for the sale of defendant's lands by the plaintiff and the division of profits therefrom, is nonsuited because the evidence of fraud, bad faith and arbitrariness on the part of the defendant in refusing the offers procured by the plaintiff for the sale of the land in accordance with the contract, were not supported by allegation, the judgment as of nonsuit will not operate as a bar to a subsequent action brought within the statutory period on the same cause of action where the allegations are not substantially identical with those of the first, but the deficiency in the allegations of the first action are supplied therein and evidence introduced to support them, and the doctrine of *res judicata* does not apply.

APPEAL by plaintiff from *Sink, Special Judge,* at April Term, 1930, of BUNCOMBE. Reversed.

This is an action brought by plaintiff against defendant for breach of contract. The plaintiff alleges that during the life of the contract that he had from different parties bona fide offers to purchase the 150 acres of land, as set forth in the contract below.

The allegations in the complaint substantially were, and there was evidence to sustain them: That he paid under the contract a considerable sum of money in advertising the land for sale and made personal efforts to that effect. That he obtained:

(1) An offer by George M. Burns for farm $300.00 an acre, one-third cash, balance one and two years, secured by mortgage on the land. Also that Burns and Barnes offered $300.00 an acre for the whole farm, or $500.00 an acre for one tract of it, and $15,000 for 103-acre tract.

(2) Offer made by Wade Holley $45,000 cash.

(3) Offer made by Outlaw & Bordner, $45,000 for tract, one-third cash, balance one and two years, secured by deed in trust on the land.

(4) Offer made by Revis, "his terms as I believe $10,000 in secured notes, and the balance in 1 and 2 or 1, 2 and 3 years, secured by deed in trust on the farm in question. It involved trading in $10,000 notes of R. B. Zagier, who is a merchant and lives in Asheville. Mr. Outlaw's financial worth was $250,000 to $300,000 at that time. Don't know exactly about the worth of Mr. Revis.

(5) Offer made by Mrs. R. D. McDonald now Mrs. Connally. She was a Coxe and when Mr. Coxe died she married a McDonald, now Mrs. Connally. Prior to her marriage she was Mary Connally, the daughter of old Colonel Connally, in Victoria. I took her there lots of times. She offered $45,000 for it, $300.00 an acre, one-third cash, balance 1, 2 and 3 years. I communicated the offer to Mr. Green. He wouldn't take it, but Mr. Green told me to swap her the farm and give her $90,000 to boot for the building there by the Emporium Building, that she owned, he thought, but Mrs. Cheesborough, the sister of Mrs. Connally, owned it. I submitted it to Mrs. Connally and she submitted it to Mrs. Cheesborough. Mrs. Cheesborough said that she didn't want to make the exchange. I guess Mrs. Connally's worth at the time was a million dollars or more. All of the offers were made in the twelve months period set out in the contract. Mr. Outlaw's offer was the first. I made an offer on the farm, it is in writing signed by me."

Plaintiff also submitted an offer in writing. The defendant refused to accept any of the offers.

The contracts are as follows:

Asheville, N. C., 14 March, 1925.

"F. B. Ingle, agent, I, this day accept your proposition on the T. L. Johnson and wife, M. E. Johnson, purchasing 189 acres of land, more or less, known as the Johnson lands located in Mills River Township. I agree to the terms mentioned. The party of the first part is to have land surveyed and I am to pay one hundred dollars per acre to pay on delivery of good and sufficient title, one-fourth cash of purchase price to give deed of trust back on land for equal payments, one, two, three, four and five years. Notes bearing six per cent interest. Interest payable semiannually. I am attaching my check for one hundred and fifty dollars ($150.00) to show good faith, that being part purchase money. This deal is to be closed up on or before 1 May, 1925.

J. R. REID.
T. L. JOHNSON.
M. E. JOHNSON.

Witness: F. B. Ingle.

I hereby transfer all my right, title and interest to Gay Green and F. B. Ingle.

J. R. REID.

Asheville, N. C., 14 April, 1925.

"This form of contract by and between Gay Green, party of the first part, and F. B. Ingle, party of the second part. The party of the first part purchased the T. L. Johnson farm, containing 150 acres for $16,000, through the party of the second part with the understanding that both parties hereto are to share all profits equally above the purchase price of $16,000, and each party is to bear equally in all expense of handling and selling said farm. Provided a satisfactory sale can be made within twelve months from date.

GAY GREEN.
F. B. INGLE."

The plaintiff, among other things, alleges: "That as this plaintiff is advised, informed and believes, and so avers, that the refusal of the defendant to agree to any of said sales was not because the proposed purchaser was unsatisfactory nor that he was not ready, able and willing to comply with his proposal, nor that it was not such as would have produced a satisfactory sale, as contemplated between the parties. But that his claim of dissatisfaction, if any was merely pretense and not a fact, was feigned and not based upon an actual dissatisfaction, was in bad faith and was unlawful, fraudulent and arbitrary, done for the sole purpose of hindering, defrauding and cheating this plaintiff of his rights under said contract. That the title to said lands being in defendant, rendering the plaintiff unable to consummate any one of said sales without the coöperation and consent of the defendant, and by reason of said wrongful, unlawful, fraudulent and arbitrary conduct on the part of the defendant, in not accepting said sales or any one of them, this plaintiff lost the benefit of the profits that would have been derived from any one of said sales, one-half of which amounted to more than $14,500, with interest from 14 April, 1926. That as hereinbefore alleged, the plaintiff has an interest under said agreement, based upon a valuable consideration, and as such had a mutual interest in the sale of said lands, at a profit and the net proceeds derived therefrom, along with the defendant, and the defendant owed to the plaintiff a duty in the nature of a trustee, to conserve said interest, and to act with reason, diligence and prudence, giving due consideration to the plaintiff's rights, requiring him to coöperate with the plaintiff by consenting to any sale produced by the plaintiff, that involved a reasonable profit, within the time, offered by any purchaser ready, able and willing to comply. That the offers of sale hereinbefore alleged, and each and every of them were such sales as required of the defendant acceptance on his part, but notwithstanding all of this, the defendant, for the purpose of conserving his own interest, and in disregard of the plaintiff's rights under said contract, wrongfully and unlawfully and arbitrarily refused to accept any of said sales, thereby causing this plaintiff to be damaged in the sum of more than $14,500, as hereinbefore alleged, with interest thereon from 14 April, 1926. Wherefore, the plaintiff prays the court that he have and recover judgment against this defendant for the sum of $14,500, and interest from 14 April, 1926; the cost of the action and such other and further relief as to the court may seem just and proper."

The material allegations of the complaint were denied by the defendant. The defendant denied that the plaintiff ever secured and submitted to him any bona fide offers for the purchase of said property, as alleged in the complaint.

The defendant further plead *res adjudicata:* "That on or about 29 July, 1926, the plaintiff instituted in the Superior Court of Henderson County, North Carolina, a suit against this defendant, in which he sought to recover from this defendant damages for an alleged breach of the identical contract mentioned and described in the plaintiff's complaint and on which this suit is founded. That said suit so instituted in the said Superior Court of Henderson County came on for trial at the March Term, 1928, of the Superior Court of Henderson County and a jury was duly empaneled to try the issues therein joined. That both plaintiff and defendant offered evidence upon the merits of said suit, and at the close of all of the evidence a judgment of nonsuit was entered in said cause. That the plaintiff duly appealed to the Supreme Court of the State of North Carolina from said judgment of nonsuit, and said judgment was, by an opinion of said Court, filed on 12 December, 1928, and reported in 196 N. C., 381; said judgment of nonsuit so rendered by the said Superior Court of Henderson County was affirmed. That as will more fully appear by reference to the pleadings in said cause in the Superior Court of Henderson County, North Carolina, the cause of action on which the plaintiff sought to recover in that suit is identically the same cause of action attempted to be set out in the complaint in this suit, and as defendant is advised and believes, said cause having been tried on its merits in the Superior Court of Henderson County, North Carolina, and a judgment having been rendered against the plaintiff in said action, all questions arising out of the contract sued on in this action have become and are now *res adjudicata* and the plaintiff is barred by said judgment from a further prosecution of this action."

There were additional allegations in the complaint to those in the first action and different evidence in this case from that in the former. There was a judgment of nonsuit in the court below, plaintiff excepted, assigned error and appealed to the Supreme Court.

Arledge & Taylor for plaintiff.
Alfred S. Barnard for defendant.

CLARKSON, J. The question involved:

(1) This is an action on contract, set forth in the complaint, which provides that the plaintiff was to have one-half of the profits arising from the sale of a tract of land "provided a satisfactory sale can be made within 12 months from date." The plaintiff contends that he produced a number of purchasers, ready, able and willing to buy at a price and on terms that were satisfactory to him and that would have proven satisfactory to both if accepted by the defendant, but that the defendant arbitrarily and fraudulently refused to accept said offers of sale for the purpose of defeating the plaintiff of his rights under the contract.

(2) The defendant set up the plea of *res judicata.* We think the nonsuit should not have been granted by the court below, and there was sufficient evidence to be submitted to the jury, and the principle of *res judicata* is not applicable.

An action on the contract involved in this controversy was tried in Henderson County and from a judgment of nonsuit therein the plaintiff appealed to the Supreme Court, which was confirmed at the Fall Term, 1928 (see *Ingle v. Green,* 196 N. C., 381), on the ground that the plaintiff did not allege fraud or arbitrariness. Thereupon the plaintiff brought this action in March, 1929, alleging fraud and arbitrary action, as set forth in the complaint before mentioned.

In *Ingle v. Green, supra,* this Court said "There is no allegation that the defendant acted fraudulently or arbitrarily in refusing to sell." In the present action the complaint is full, plenary and explicit on this subject. *Graves v. O'Connor, post,* 231.

In *Hampton v. Spinning Co.,* 198 N. C., at p. 240, we find: "If the Supreme Court affirms the judgment of the trial court, he may under C. S., 415, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata,* and thus end that particular litigation." *Midkiff v. Insurance Co.,* 198 N. C., 569; *Chappell v. Ebert,* 198 N. C., 575.

It will be noted that in the *Hampton case, supra,* are these words: "that the second suit is based upon substantially *identical allegation* and substantially *identical evidence.*" The present action is not based upon substantially "identical allegation." In the former action there was *probata without allegata.* There must be *allegata et probata.* In the present action there is *allegata et probata.*

In *Moses v. Morganton,* 195 N. C., at p. 101, it is said: "'A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Harrington v. Rawls,* 136 N. C., 65.' *Strunks v. R. R.,* 188 N. C., at p. 568."

As the case goes back for a new trial, there are other questions raised by the able and learned attorneys for the litigants that we need not now consider.

For the reasons given the judgment of the court below is
Reversed.

JOHN RICE, EMPLOYEE, v. DENNY ROLL & PANEL CO., EMPLOYER, LONDON GUARANTEE & ACCIDENT CO., CARRIER.

(Filed 2 July, 1930.)

1. **Master and Servant F a—Workmen's Compensation Act should be construed as a whole.**

   The various provisions of the Workmen's Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the Legislature to provide compensation to an employee for injury arising out of and in the course of his employment.

2. **Master and Servant F h—Employee disabled and losing members through injury is entitled to compensation under both secs. 29 and 31.**

   Section 29 of the Workmen's Compensation Act allowing compensation to a workman for total temporary disability should be construed in *pari materia* with section 31 thereof allowing compensation for the loss of members, and so construed it is *held:* that where an employee has suffered an injury to his hand arising out of and in the course of his employment, and the injury causes him total temporary disability in the course of its healing, and renders it necessary to amputate certain parts of certain fingers of the hand, he is entitled to receive compensation under section 29 for total temporary disability, and in addition thereto compensation for the loss of the parts of his fingers under section 31, there being no provision in the act that the later should preclude the former, compensation for the later to begin upon expiration of the compensation for the former.

3. **Master and Servant F i—Findings of fact by Industrial Commission are conclusive on appeal.**

   The findings of fact by the Industrial Commission as to claims under the Workmen's Compensation Act are conclusive upon appeal, and its conclusions of law are persuasive authority.

APPEAL by plaintiff from *McElroy, J.,* at April Term, 1930, of GUILFORD. Reversed.

The court below held that the Industrial Commission committed error in its conclusions of law in allowing the plaintiff compensation for the period of temporary total disability under section 29 of the Workmen's Compensation Act, in addition to specific compensation under sections 31 of said act, and reversed the award of the Commission for temporary total disability. Plaintiff excepted and assigned error and appealed to the Supreme Court.

Austin & Turner for plaintiff.
Peacock & Dalton for defendants.

CLARKSON, J. This matter has been fully discussed in Rice *v.* Roll and Panel Co., Vol. 1, p. 341, Advance Sheets, North Carolina Industrial Commission, opinion by Wilson, Commissioner for Full Commission. The opinion, in part: "This cause came on for review before the Full Commission, 24 February, 1930, at Raleigh, North Carolina, upon the appeal by the carrier from the decision of Commissioner Dorsett, filed 31 January, 1930, to decide the one issue, to wit: Has the Commission the right to award compensation for temporary total disability in addition to specific where there is an amputation? *Statement of Case:* On 30 October, 1929, John Rice, the claimant, was regularly employed by the Denny Roll and Panel Company, at an average weekly wage of $25.13. On that date the claimant suffered an injury by accident resulting in some badly lacerated and amputated fingers on his left hand. The evidence tends to show that the fingers were either amputated at the time of the accident, or immediately thereafter. Dr. Burrus of the Burrus Clinic of High Point, North Carolina, was the attending physician, and testified that because of plaintiff's injury it was necessary to amputate the distal phalange of the second finger, and to amputate more than half of the distal phalanges of the third and fourth fingers. Upon the evidence, the Full Commission makes the following *Findings of Fact:* 1. That the parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act. 2. That John Rice, the claimant, on 30 October, 1929, suffered an injury by accident that arose out of and in the course of his employment, and that as the result of said accidental injury, plaintiff has lost the distal phalange of the second and more than half of the distal phalanges of the third and fourth fingers of his left hand. 3. That the plaintiff was temporarily totally disabled for a period of seven weeks and two days immediately following the accident; and that plaintiff is entitled to compensation for temporary total disability in addition to the specific award for the loss of part of members. 4. That the average weekly wage was $25.13." The *conclusions of law* are set forth, which we need not repeat. *The Award:* "For temporary total disability the plaintiff is entitled to receive sixty per cent of his average weekly wage for seven weeks and two days, in addition to this, for the specific loss of parts of the fingers as per schedule of injuries set out in section 31, the plaintiff is entitled to receive sixty per cent of his average weekly wage for a period of fifteen weeks to cover the loss of one-half of the second finger; for a period of ten weeks to cover the loss of one-half of the third finger; and for a period of seven and one-half weeks to cover the loss of the fourth finger."

The sole question for our determination: Where an employee by accident arising out of and in the course of his employment loses by immediate amputation certain parts of three fingers, is he entitled to compensation under section 29 of the Workmen's Compensation Act for the period of this temporary total incapacity or disability during the healing period, in addition to the amount allowed for loss of the members under section 31 of the said act, the payment of compensation under section 31 starting on the termination of payment under section 29? We think so.

Section 29 is as follows: "Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death the total sum paid shall be six thousand dollars, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased."

In *Smith v. Light Co.,* 198 N. C., at p. 621, it is held that "the last clause of section 29 is totally repugnant to the definite method of settlement prescribed in sections 38 and 40." Compensation for "death by accident arising out of and in the course of the employment" whether dependents or not are relegated to sections 38 and 40. *Reeves v. Parker-Graham-Sexton, Inc., post,* 236.

Section 31 has a schedule of injuries and fixes the rate and period of compensation.

This matter has been up several times before the Industrial Commission, and the unanimous decisions of the Commission sustain plaintiff's contention. Adams *v.* Buffalo Snowbird Co., Vol. 1, p. 232; Kennedy *v.* Collins Granite Co., Vol. 1, p. 346, Advance Sheets, N. C. Industrial Commission.

The defendants contend, and correctly so, quoting 25 R. C. L., p. 964: "There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive and the judicial."

In *Johnson v. Asheville Hosiery Co., ante,* 38, speaking to the subject, it is said: "It is generally held by the courts that the various compensation acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation."

Under section 60 the findings of fact by the Commission shall be conclusive and binding. We may add that the rulings of law by the Commission are persuasive and ought to have weight on appeal to this Court.

Section 2(i): "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

In section 29, What is *incapacity?* "Any deprivation of power to work as the result of injury is 'incapacity,' within the meaning of the provisions of the Workmen's Compensation Act (Laws 1911, ch. 218) section 12 and section 11, as amended by Laws 1913, ch. 216 sec. 5, authorizing the allowance of compensation for incapacity." *Gorrell v. Battelle,* 144 Pac., 244, 246, 93 Kan., 370.

The plaintiff, under the well understood meaning of the word "incapacity" or "disability" to earn the wages which he was receiving at the time of the injury, was for seven weeks and two days during the healing period of the injury totally incapacitated for work. This disability or incapacity was temporary, but total, during said period, and the compensation is fixed in said section for such disability or incapacity.

In 25 R. C. L., statutes, part section 248, p. 1009, we find: "The construction of a statute can ordinarily be in no wise affected by the fact that it is subdivided into sections or titles. A statute is passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently the several parts or sections of an act are to be construed in connection with every other part or section and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers."

When the period of temporary disability or incapacity ceases, what is plaintiff's compensation for the injury or loss to his members?

Section 31, says: "In cases included by the following schedule, the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, to wit: "For the loss of" etc., under the section, specifying the particular member. For the specific injury or loss the plaintiff is entitled to receive sixty per cent of his average weekly wage for a period of fifteen weeks to cover the loss of one-half of the second finger; for a period of ten weeks to cover the loss of one-half of the third finger; and for a period of seven and one-half weeks to cover the loss of one-half of the fourth finger.

Is this section 31 exclusive or should it be construed *in pari materia* with 29, as was done by the Commission? We think the sections should be construed together. We are led to this conclusion by the purpose of the act—indicated by its name—compensation. It would be a narrow construction to allow the plaintiff no compensation for seven weeks and two days for the healing period he was temporarily totally incapacitated for work and only get what is allowed him under section 31 for the loss of the member. If the injury healed immediately, he could go back to work to support himself and dependents. When it does not, and he is confined for seven weeks and 2 days, how is he and his dependents cared for? Should they be cared for out of the compensation allowed him for the specific loss of his fingers? This seems to us to be a narrow and hard ruling under a reasonable construction of the sections of the act and we cannot so hold.

Section 29 covers total incapacity for work resulting from the injury and section 31 covers "loss" for the injured member, and the language of the latter section "the compensation so paid for such injury" and then again "The disability in each case shall be deemed to continue for the period specified." The compensation under 31 is paid for the injury or loss for the member and not for total incapacity for work resulting from the injury under 29.

Legislative reports may persuasively show that the particular statute in question should not be narrowly or restrictively interpreted, although they cannot be taken as giving to the law a meaning not fairly within its word. *St. Louis I. M. & S. R. Co. v. Craft,* 238 U. S., 648, 35 Sup. Ct. Rep., 704.

The General Assembly seems to have considered with care the provisions of section 31. In some of the states the compensation for loss or injury for some member is "in lieu of all other compensation." Section 32 of the original Cannady-Haywood Senate Bill, No. 83, on file in the Secretary of State's office, File No. 526, reads: "In cases included by the following schedule, the incapacity in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, *and shall be in lieu of all other compensation.*" Section 31 in the Compensation Law, as finally adopted, which corresponds to section 32 of the original bill, reads: "In cases included by the following schedule, the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, to wit: "For the loss of" specifying the particular members, etc. The General Assembly left out of the clause, "and shall be in lieu of all other compensation."

We think this throws light on the construction of these sections. We do not think section 30 in any way militates against the construction put on section 29 and 31, as the beginning of section 30 says "except as otherwise provided in the next section hereafter."

The decisions are not uniform over the nation, of course so many different acts are to be construed with different phraseology. It is contended by plaintiff, in a carefully prepared brief, that the weight of authority is in conformity to the opinion of the Industrial Commission on the subject. Plaintiff and the Industrial Commission cite many decisions tending to uphold their view. On the other hand, the defendants contend to the contrary and have a comprehensive and analytical brief tending to uphold their side of the contention. This is a new act, and we are deciding the particular questions as they arise. We see no good purpose in going into a long discussion of the cases cited on either side.

The judgment of the court below is

Reversed.

CITY OF STATESVILLE, A MUNICIPAL CORPORATION, v. MRS. BELLE WALKER JENKINS AND MISS BEULAH JENKINS.

(Filed 2 July, 1930.)

1. Municipal Corporations G d—General statute of limitations does not apply to street assessments under city charter in this case.

The lien given to a city against abutting owners for street improvements is a lien upon the particular land superior to all others, C. S., 2713, and is not chargeable or collectible from other property of the owner, C. S., 2716, and where the charter of the city creates the lien from the commencement of the improvement work, and provides that the improvement charges shall continue to be a lien upon the land until fully paid, the ten-year statute of limitations does not run against the city in favor of the owner or one claiming under him without notice of the lien so long as the lien continues by the nonpayment of the assessment lien so created.

2. **Same—Ch. 331, Public Laws of 1929 do not apply to limit time for enforcing assessment lien for improvements in this case.**

A statute which shortens the time within which an action may be brought must give a reasonable time for the enforcement of rights affected thereby, and chapter 331, Public Laws of 1929, (b) will not apply to bar a municipality's right to enforce assessments for street improvements, the liens for which had attached before its passage, the act failing to give a reasonable time for the enforcement of the assessments by the city.

3. **Same—The charter of a city governs the liability for street assessments made thereunder rather than general statutory provisions.**

A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality, and is not repealed by the enactment of a general statute, and the charter of a city providing that assessments for street improvements shall remain in full force and effect until fully paid, governs the liability of those assessed thereunder rather than general statutory provisions in regard thereto.

STACY, C. J., dissenting; BROGDEN, J., concurs in dissent.

APPEAL by plaintiff from *Stack, J.,* at November Term, 1929, of IREDELL. Reversed.

This is a controversy without action, the agreed statement of facts is as follows:

1. The city of Statesville is a municipal corporation and as such, under the general law and by the provisions of its charter, is authorized to pave the streets in said city of Statesville and to make a local assessment against the property abutting thereon for a part of the costs of said pavement.

2. That in the year 1912, the said city of Statesville caused to be levied against the property hereinafter described a street assessment for the principal amount of $300.50, the date of said assessment being 1 September, 1912, and that said special assessments were payable in ten equal, annual installments maturing thereafter on 1 September in each year as follows: $30.05 due 1 September, 1913; $30.05 due 1 September, 1914; $30.05 due 1 September, 1915; $30.05 due 1 September, 1916; $30.05 due 1 September, 1917; $30.05 due 1 September, 1918; $30.05 due 1 September, 1919; $30.05 due 1 September, 1920; $30.05 due 1 September, 1921; $30.05 due 1 September, 1922.

3. That at the time said assessment was levied by the city of Statesville, E. Morrison was the owner of the lands against which said assessment was levied, but that the same were sold by E. Morrison to Dr. J. J. Mott and upon the death of the said Dr. J. J. Mott, were sold in the process of the administration of his estate by a commissioner appointed by the court to sell the said lands to make assets for the estate of the said Dr. J. J. Mott, and purchased by D. F. Jenkins, the husband of the defendant, Mrs. Belle Walker Jenkins, and the father of the de-

fendant, Miss Beulah Jenkins, from whom the present defendants acquired the property, same being the home place on the east side of North Center Street, in the city of Statesville.

4. That neither D. F. Jenkins nor the defendants had any notice of the existence of said street assessment from the city of Statesville and that the same was not paid by the commissioner appointed by the court to sell the same for the estate of Dr. J. J. Mott, and the first notice that the defendants had of the existence of said street assessment was in the year 1929, just before the city of Statesville started foreclosure sale of said lands 1 November, 1929.

5. That the city of Statesville has advertised a foreclosure and sale of said lands for the purpose of collecting the entire amount of said assessment and the same are now advertised for sale.

6. The defendants contend that each of said installments that has been due and unpaid for ten years from the date the said installment was due, is barred by the statute of limitations and that the city of Statesville cannot collect the same on account of said lapse of ten years since the maturity of said installments, it being agreed that seven of said installments, aggregating $210.35, together with all accumulated interest thereon, have been due and payable for more than ten years and that three of said installments in the amount of $90.15 principal, with accumulated interest, have not been due for ten years.

7. The city of Statesville contends that the statute of limitations does not run against said special assessment and that the entire amount is due by the defendants, as the owners of the property.

It is agreed that if the court shall find that the first seven installments which have been due more than ten years are barred by the statute of limitations, the court shall give judgment in favor of the city of Statesville for the remaining three installments in the amount of $90.15, with interest thereon from 1 January, 1913, or if the court should find that the said first seven installments are not barred by the statute of limitations, the court shall render judgment in favor of the city of Statesville for the entire amount."

The judgment of the court below is as follows:

"This cause coming on to be heard at the November Term of Iredell County Superior Court before his Honor, A. M. Stack, upon an agreed statement of facts submitted by the plaintiff and defendants and the court being of the opinion that the statute of limitations would apply against all assessments that have been due for a period of ten years or more and that the defendants have only three assessments that come within the ten-year period and are not barred by the statute of limitations. It is, therefore, considered, ordered and adjudged that the seven assessments of $30.05 against the property of the defendants are hereby barred and that three of said installments or assessments, in the sum of $30.05 each, are due and that the plaintiff recover of the defendants the sum of $90.15, together with interest from 1 January, 1913, and for the costs of this action to be taxed by the clerk."

The plaintiffs excepted to the judgment as signed, assigned error and appealed to the Supreme Court.

Long & Glover for plaintiff.
Scott & Collier for defendants.

CLARKSON, J. The questions involved in this controversy:

1. Does the 10-year statute of limitations bar the city of Statesville from collecting street assessments, or installments thereof, more than 10 years past due? We think not.

2. Do the provisions of chapter 331, subsection b of section 1, apply to this case, in view of the failure to give a reasonable time to bring an action before said act became effective? We think not.

3. Is the liability of a property owner for street improvement special assessments levied by the city of Statesville, governed by general statutory liability or the provisions of the charter of the city of Statesville providing that such assessments shall be and remain in full force and effect until fully paid? We think by the charter of the city of Statesville.

Under the first question involved, we find that the pertinent provisions of the charter of the city of Statesville, Private Laws of 1911, chapter 243, sec. 45, relative to paving assessments, is as follows: "That the amount of the charges made against the landowners and assessed on the respective lots as hereinbefore provided for shall be and constitute from the commencement of the work for which they are charged and assessed, liens on the respective lots upon which they are charged and assessed; that the said amounts shall be placed in the hands of the tax collector for collection, and any property owner shall have the right to pay the charges made as hereinbefore prescribed in ten equal annual installments from and after the commencement of such work, with interest thereon at six per cent per annum from the date of such commencement, in which case the amounts due shall be and remain a lien on the lot or lots against which they are charged and assessed until fully paid," etc.

In the law under which the assessment was made, we find this clear language *"in which case the amounts due shall be and remain a lien on the lot or lots against which they are charged and assessed until fully paid."*

An assessment made upon adjoining land for a street improvement by a town is a charge upon the land constituting a lien superior to all others, C. S., 2713, and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed payable in installments, C. S., 2716, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself. The provisions of C. S., 93, as to the order of payment of debts of the deceased has no application. *Carawan v. Barnett,* 197 N. C., p. 511.

The rights of the plaintiff are governed by the statute which makes the assessment. The statute gives a lien *in rem,* the lot or lots against which they are charged and assessed until fully paid. In the present case, it is conceded that the assessment has not been paid. The case of *Morganton v. Avery,* 179 N. C., 551, is distinguishable from this case.

As to the second question involved: We do not think the provisions of ch. 331, Public Laws 1929, subsec. b of sec. 1, applicable. "Where the bar of the statute is not complete a change in the statute may extend or shorten the time, but in the latter case a reasonable time must be given for the claimant to enforce his right." McIntosh N. C. Practice and Procedure, p. 105. In the note are cited cases as to what is a reasonable time.

In *Strickland v. Draughan,* 91 N. C., at p. 104, it is said, quoting numerous authorities: "In *Terry v. Anderson,* 95 U. S. Rep., 628, *Chief Justice Waite,* speaking for the Court, said: 'This Court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of the action before the bar takes effect.' . . . He further says in the same opinion, that parties have no more vested interest in a particular limitation which has been fixed, than they have in the form of the action to be commenced, and as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remains. Strictly, the principle he announced applies only to the statutes of limitation." *Matthews v. Peterson,* 150 N. C., at p. 133; *Graves v. Howard,* 159 N. C., 594; *Fisher v. Ballard,* 164 N. C., 329; *Barnhardt v. Morrison,* 178 N. C., at p. 568-9; see *Humphrey v. Stephens,* 191 N. C., 101; *Williams v. Motor Lines,* 195 N. C., 682. The statute we are considering fixed no time for the commencement of the action, but barred all assessments ten years from the default in the payment of any installment. *Ashley v. Brown,* 198 N. C., 369.

In *Dunn v. Jones,* 195 N. C., at p. 356, it is said: "No person can claim a vested right in any particular mode of procedure for the enforcement of defense of his rights. Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending, and future actions.' *Stacy, C. J.,* in *Martin v. Vanlaningham,* 189 N. C., 656." *Gillespie v. Allison,* 115 N. C., 542.

The statute under consideration does not enlarge, but restricts, and no reasonable time is given in which to bring the action. We think the law quoted is controlling.

As to the third question involved: It is well settled, citing numerous authorities, in *Felmet v. Commissioners,* 186 N. C., at p. 252: "A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality, and is not repealed by the enactment of a subsequent general law." *Asheville v. Herbert,* 190 N. C., at p. 736; *Monteith v. Commissioners of Jackson,* 195 N. C., 74-5; *Goode v. Brenizer,* 198 N. C., 217.

For the reasons given, the judgment below is

Reversed.

STACY, C. J., dissenting: As no period of limitation is mentioned in the charter of the city of Statesville (the idea of perpetuity not being accepted), it would seem that, under *Morganton v. Avery,* 179 N. C., 551, 103 S. E., 138, all the installments were barred by the three-year statute of limitations when chapter 331, Public Laws 1929, was enacted by the Legislature. Hence the plaintiff is in no position to complain at the holding that seven installments are barred under the 1929 statute, and three not.

BROGDEN, J., concurs in dissent.

THE LAMSON COMPANY, INC., v. J. L. MOREHEAD, RECEIVER OF RAWLS-KNIGHT COMPANY.

(Filed 2 July, 1930.)

1. **Parties B b—Judgment sustaining demurrer of party joined as defendant on motion of original defendant held not error.**

   Where in an action against the receiver of an insolvent corporation on an executory contract the plaintiff alleges that there was no contractual relation between it and the purchaser from the receiver of the property which was the subject-matter of the contract, and the purchaser is made a party on motion of the receiver who alleges that the purchaser is solely liable to the plaintiff: *Held,* judgment sustaining the demurrer of the purchaser is not error.

2. **Corporations H a—Damages may be recovered against receiver of insolvent corporation for breach of executory contract.**

A receiver of an insolvent corporation may be sued for damages for breach of an executory contract of the corporation by permission of court, *Wade v. Loan Association*, 196 N. C., 171, in which the action was upon an executory contract of employment, cited and distinguished.

3. **Courts A a—Where sum demanded in action against receiver for breach of executory contract exceeds $200 Superior Court has jurisdiction.**

Where, in an action against the receiver of an insolvent corporation for breach of an executory contract, the sum demanded in good faith exceeds two hundred dollars, the Superior Court has jurisdiction, the plaintiff being entitled to recover thereon upon a proper showing, the contract not being an executory contract of employment invalidated by the receivership.

APPEAL by plaintiff from *Cranmer, J.*, at October Term, 1929, of DURHAM. Reversed.

This is an action instituted by plaintiff against the defendant to recover the sum of $477.97 due on a certain contract for a Lamson Preferred Cash Carrier System, made by plaintiff with Rawls-Knight Co., a corporation that is now insolvent, and J. L. Morehead, the defendant, is the duly appointed receiver. The plaintiff filed a petition stating that it had a good cause of action against defendant and praying the court to make an order authorizing and allowing it to enter suit against the defendant for said sum of $477.97. The court below made an order authorizing and empowering plaintiff to bring an action against said defendant for the sum mentioned. In the petition, the plaintiff alleges: "That this affiant is advised, informed and believes, and so states, that the said receiver acknowledges the correctness of said claim, but asserts that the claim should be paid by a corporation known as the Sinkoe Company, who purchased the assets of Rawls-Knight Company, and as the said receiver alleges, assumed the payment of this portion of the indebtedness of the said Rawls-Knight Company; that the said Lamson Company has no contractual relation whatsoever with the said Sinkoe Company."

The receiver answered and, among other things, said: "It is admitted that the Rawls-Knight Company was indebted to plaintiff for rentals on the property covered by the contract marked Exhibit A, from 1 June, 1928, to 4 December, 1928, in the amount of $87.63, and this amount defendant, as receiver, has offered and now offers to allow as an approved claim against the said Rawls-Knight Company, and to pay thereon its distributive share of the assets of the Rawls-Knight Company. . . . And defendant further says that if plaintiff is entitled to any relief as against this defendant, which is denied, it is entitled only to have its claim approved and filed by the receiver, and is entitled to recover thereafter only its distributive share of the assets of the Rawls-Knight Company; that in no event is plaintiff entitled to recover of this defendant the full amount prayed for in the complaint."

The defendant further sets up as a defense and alleges that certain of the property of Rawls-Knight Company, describing it, which he held as receiver, that an offer of purchase was made by E. I. & R. A. Sinkoe for same. That a report was duly made to the court and an order was made by the court authorizing and instructing the defendant to sell and convey, which he did, the "goods, merchandise, furniture, fixtures and equipment of the Rawls-Knight Company," to the said E. I. and R. A. Sinkoe for $7,750.

The defendant further alleges: "That prior to receiving the offer from E. I. and R. A. Sinkoe this defendant had discussed the sale of the business of the Rawls-Knight Company to the Sinkoe Brothers with P. D. Alexander, manager of plaintiff company, with officers in the city of Atlanta, Georgia, and received his permission to transfer to the purchasers, in the event the entire business was sold, the properties of the Lamson Company held under lease or agreement, and immediately upon effecting the sale to the said E. I. and R. A. Sinkoe this defendant notified the said P. D. Alexander that the said sale has been made. . . . This defendant says that by the terms of the order made by his Honor, W. A. Devin, resident judge, and by the terms of the agreement with the said E. I. and R. A. Sinkoe, as shown by the bill of sale covering the transfers of the company, and with the consent and approval of the Lamson Company, the equipment referred to in the agreement with the Lamson Company was transferred and sold to the said E. I. and R. A. Sinkoe, and that they are solely responsible to plaintiff for any amount which may be due under said agreement. . . . Except such distributive dividends as may have heretofore been paid, or may be hereafter paid, by him as receiver on the amount of $87.63, the amount of past due rentals due by the Rawls-Knight Company, and further the sum of $12.40 as rent of the Lamson system from 5 December, 1928, to 1 January, 1929, the time such system was used by this defendant, as receiver. . . . That said E. I. and R. A. Sinkoe are necessary parties to the proper adjustment of this action, and the receiver asks that an order be issued making said E. I. and R. A. Sinkoe party-defendants, and that summons be issued to them to appear and take such actions as they may deem best."

An order was duly made making E. I. and R. A. Sinkoe parties defendant to the action. The said E. I. and R. A. Sinkoe demurred to the complaint on the ground that there is a defect of parties. C. S., 511(4). That the complaint does not state facts sufficient to constitute a cause of action. C. S., 511(6). They set forth several grounds, among them that the court had no jurisdiction as plaintiffs' claim was for less than $200 under the contract.

The judgment of the court below was as follows: "The pleadings of plaintiff and defendant, J. L. Morehead, receiver of Rawls-Knight Company, were read and the court heard argument of counsel for all the parties upon the demurrer of E. I. Sinkoe and R. A. Sinkoe, and during the argument upon the demurrer J. L. Morehead, receiver of Rawls-Knight Company, through his counsel, without further notice, entered a demurrer *ore tenus* to the complaint of the plaintiff, and the court being of the opinion that the complaint of the plaintiff does not set out a cause of action within the jurisdiction of the Superior Court, and that this court is without jurisdiction for the reason of the fact that the amount in controversy is less than $200.00. It is now, therefore, considered, ordered and decreed that the demurrer filed by the defendants, E. I. Sinkoe and R. A. Sinkoe, be, and the same is hereby sustained, and it is further considered, ordered and adjudged that the demurrer *ore tenus* of J. L. Morehead, receiver of the Rawls-Knight Company, be and the same is hereby sustained, and it is further considered, ordered and adjudged that this action be, and the same is hereby dismissed at the cost of the plaintiff."

The plaintiff assigned errors: That "the court committed error in sustaining the demurrer of E. I. Sinkoe and R. A. Sinkoe. The court committed error in sustaining the demurrer *ore tenus* of J. L. Morehead, receiver of Rawls-Knight Company. The court committed error in signing the judgment, as set out herein."

McLendon & Hedrick for plaintiff.
John Newitt for defendants E. I. and R. A. Sinkoe.
W. H. Murdock for defendant J. L. Morehead, receiver.

CLARKSON, J. The plaintiff in the petition distinctly alleges "that the said Lamson Company has no contractual relation whatsoever with the said Sinkoe Company." We cannot see how the defendant can have E. I. and R. A. Sinkoe made parties to the action and then plead for plaintiff that the Sinkoes are solely responsible to it when the plaintiff says there is no contractual relation between it and the Sinkoes. *Benevolent Assn. v. Neal,* 194 N. C., 401. Then again, the court below sustained the demurrer filed by the Sinkoes. The plaintiff appealed. *The receiver did not.* We find no error in the court below sustaining the demurrer of the Sinkoes.

In *Sewing Machine Co. v. Burger,* 181 N. C., at p. 255, concurring opinion of *Clark, C. J.,* it is said: "In the Superior Court the sum demanded in good faith confers jurisdiction and when this is done the court is not forbidden to give judgment for less than $200." *Duckworth v. Mull,* 143 N. C., 461; *Houser v. Bonsal,* 149 N. C., 51; *Wooten v. Drug Co.,* 169 N. C., 64; *Williams v. Williams,* 188 N. C., 728; McIntosh, N. C. Prac. and Proc., p. 56, sec. 57.

We infer that the demurrer was sustained on behalf of defendant, receiver, on the ground that on the appointment of a receiver, it made plaintiffs' executory contract impossible of performance by the Rawls-Knight Company, and the plaintiff could recover only the amount due when the receiver was appointed. That the amount was $87.63, and plaintiff was only entitled to a distributive dividend to be paid on that amount and the sum of $12.40 due by the receiver as rental. These amounts were under $200.00, and the Superior Court had no jurisdiction. Constitution of North Carolina, Art. IV, sec. 27.

The court below, no doubt, based its opinion on *Wade v. Loan Assn.,* 196 N. C., p. 171. It is there held: Upon the appointment of a receiver by a court of competent jurisdiction for any cause, executory contracts of employment of a corporation are thereby invalidated during the receivership, performance being made impossible by operation of law, and damages may not be recovered for its breach. *Lenoir v. Improvement Co.,* 126 N. C., 922.

It may be noted that in plaintiff's contract it sets forth "if receivers are appointed to take possession of the business of the user . . . all unpaid amounts to the end of this agreement . . . be at once precipitated and become due and payable."

We do not extend the doctrine in the *Wade* and *Lenoir cases, supra,* further than as there laid down applicable where the relationship is that of officers, agents or employees. We can see no reason why a corporation although placed in the hands of a receiver should not be liable for its executory contracts. Plaintiff's contract was not recorded whether it should be as against creditors and purchasers for value, we are not called upon now to decide. C. S., 3312. *Trust Co. v. Motor Co.,* 193 N. C., 663; *Acceptance Corp. v. Mayberry,* 195 N. C., 508. We may say that plaintiff's contract does not appeal to the conscience of a court of equity. Courts are slow to enforce unconscionable contracts.

In *Bangert v. Lumber Co.,* 169 N. C., at p. 630, it is said: "Equity does not favor forfeitures or penalties, and will relieve against them when practicable, in the interest of justice. 2 Story Eq., p. 644; *Carpenter v. Wilson,* 59 Atl. Rep., 187; *Seldon v. Camp,* 95 Va., 528."

The sum demanded by plaintiff, and for which the court allowed plaintiff to bring this action, was over $200.00, to wit, $477.97. The sum demanded seems to have been made in good faith. The rights of the parties under the contract we do not pass on. The Superior Court had jurisdiction.

For the reasons stated, the judgment of the court below sustaining the demurrer of the receiver, is

Reversed.

STATE OF NORTH CAROLINA, EX REL. A. G. MYERS, J. ALLAN TAYLOR, E. K. BISHOP, JAS. A. GRAY, JOHN W. HOUSE, I. M. BAILEY, GEORGE MARSH, T. J. PURDIE, M. O. BLOUNT, T. AUSTIN FINCH, CHAS. G. YATES AND SAM P. BURTON, CONSTITUTING THE TRANSPORTATION ADVISORY COMMISSION, v. WILMINGTON - WRIGHTSVILLE BEACH CAUSEWAY COMPANY, TIDEWATER POWER COMPANY, SHORE ACRES COMPANY ET AL.

(Filed 2 July, 1930.)

Eminent Domain C a—Demurrer to action by State for title to land necessary for inland waterway held properly overruled.

Upon pertinent allegations of the complaint by the State *ex rel.* Transportation Advisory Commission for the immediate possession of lands necessary to be conveyed to the U. S. Government for the inland waterway, a demurrer to the complaint by parties claiming title to the *locus in quo* is bad when it is made to appear that immediate possession is necessary to prevent delay in the construction of the canal and the rights of the claimants to just compensation is preserved and the faith and credit of the State is pledged for its payment in the event that they are able to establish their title, and an order of the court giving such immediate possession is not error, the right of the State thereto for this purpose being paramount.

APPEAL by defendants from order of *Grady, J.*, at September Term, 1929, of NEW HANOVER. Affirmed.

This is an action for judgment and decree that the strip of land described in the complaint is needed and required for the construction of the Inland Waterway Canal through the State of North Carolina, as authorized by an act of the Congress of the United States; that plaintiff, the State of North Carolina, is the owner of said strip of land, with the right to use same for said purpose, without compensation to the defendants or to either of them, notwithstanding claims asserted by said defendants to said strip of land; or if it shall be adjudged herein that the defendants or any of them are entitled to compensation for the taking of said strip of land by the plaintiff, for said purpose, for judgment and decree condemning said strip of land under the power of eminent domain inherent in the State of North Carolina, by reason of its sovereignty, and providing for the ascertainment as provided by law of the sum of money to which said defendants or any of them, are entitled as compensation for the taking of said strip of land by the plaintiff, for said purpose, to the end that plaintiff may pay the same, and thus acquire the title to said strip of land required for said purpose free and clear of the claims of said defendants or any one of them; and in the meantime for an order allowing and permitting the State of North Carolina to take possession of said strip of land to the end that it may convey the same to the United States, to be used by the said United States in the construction of said Inland Waterway Canal without delay.

Issues, both of law and of fact, are raised by the pleadings, which have been duly filed by the parties to the action. These issues have not been tried or determined.

At September Term, 1929, an order was made in the action, as follows:

"This cause coming on to be heard, after due notice given in open court, before his Honor, Henry A. Grady, judge holding the courts of the Eighth Judicial District, at the regular September, 1929, Civil Term of the Superior Court of New Hanover County, and being heard, upon the duly verified petition for condemnation of the lands referred to therein, and hereinafter described, which said petition was duly filed by the Transportation Advisory Commission for and on behalf of the State of North Carolina, under and pursuant to chapter 44, Public Laws of 1927, as amended by chapter 7, Public Laws 1929, and upon verified answer of defendants and their motion for injunctive relief, and it appearing to the court:

1. That the petition seeking condemnation of the lands described therein was duly filed in this cause on 15 July, 1929, as provided by law.

2. That process was duly and properly issued at the time of the filing of said petition in this court providing for personal service upon all of the above named resident defendants and service by publication upon the nonresident defendants, according to the statutes of this State.

3. That the lands referred to in the petition, and hereinafter described, are condemned for a purpose paramount to all other public uses and are necessary and essential for use in the construction of the Intra-Coastal Waterway from Beaufort Inlet to the Cape Fear River, and said lands have been designated for such use by the proper authority of the United States of America, and are more particularly defined and described herein.

4. That immediate possession is necessary and essential, to the end that the construction of the said Intra-Coastal Waterway shall not be delayed.

5. That under and by virtue of the provisions of chapter 44, of Public Laws of 1927, as amended by chapter 7, Public Laws of 1929, the said Transportation Advisory Commission from and after the institution of this proceeding, shall have and is given the right to take immediate possession of the above described lands and premises on behalf of the State of North Carolina, to the extent of the interest to be acquired, and the Governor and Secretary of said State are directed to execute a deed to the United States, which shall thereupon be entitled to appropriate and use the said lands for the purposes for which condemnation is sought.

Now, therefore, it is ordered, adjudged and decreed, that such title as is contemplated and established under the statutes hereinbefore referred to, in and to the lands and premises hereinbefore described, has vested in the State of North Carolina, and the said State has the right to the immediate possession of said property, and the said State of North Carolina, its agents, assigns, employees and contractors are hereby granted the possession of said lands for the purposes necessary in the construction of the said Intra-Coastal Waterway.

It is further ordered, adjudged and decreed that this proceeding be, and the same is hereby retained upon the dockets of this court, for the ascertainment of such damages arising out of the condemnation as the defendants herein may be entitled to receive.

HENRY A. GRADY, *Judge, etc.*"

From this order, defendants appealed to the Supreme Court.

John Bright Hill and Bryan & Campbell for plaintiffs.
Rountree & Carr and Davis & Poisson for defendants.

CONNOR, J. There was no error in the refusal of the trial judge to dismiss this action, in accordance with the motion of defendants, which was in effect a demurrer *ore tenus* to the complaint. The facts alleged in the complaint are sufficient to constitute a cause of action on which plaintiff is entitled to the relief prayed for, (1) either that upon these facts it be adjudged that the plaintiff, the State of North Carolina, is the owner of the land described in the complaint, having such title thereto as is paramount to any title which may have vested in the defendants or in either of them, and is therefore entitled to enter into possession of said land and to use the same for the purpose desired, without compensation to the defendants or to any of them, notwithstanding any title which the said defendants may have to said land; or (2) if it shall be adjudged in this action that defendants or any one of them is entitled to compensation for the taking of said land by the State of North Carolina, by reason of its ownership of the same, that said land be condemned, and that the sum of money which said defendant is entitled as just and adequate compensation for the taking of said land by the State of North Carolina be ascertained as provided by law, to the end that the State of North Carolina may pay such sum of money, and thus acquire such title to said land as plaintiff is required to have in order that said land may be used for the purpose desired. The contention of the plaintiff that neither of the defendants is the owner of the land described in the complaint or of any part thereof, as against the State of North Carolina, is bona fide. Whether this contention is well founded or not, depends upon the facts as they may be established at the trial of the action. If the contention is not sustained, then it is admitted by the defendants that the State of North Carolina, under the power of eminent domain inherent in said State by reason of its sovereignty, has the right to take said land for the purpose desired, upon the payment of full and adequate compensation to such of the defendants as may be adjudged the owners of the land. Thus it is contended by the plaintiff that the State of North Carolina has the right to take possession of the land and to use it for the purpose desired, either without compensation to defendants, if it shall be finally adjudged in this action that the title of the State is paramount to any title which the defendants or any of them have to the land, or with compensation if it shall be finally adjudged in this action that defendants or any of them are entitled to compensation, as owner or owners of the land. We know of no principle of law which requires that plaintiff shall abandon either of these bona fide contentions in order that it may recover the relief, if any, to which it is entitled. If it shall be found that the State has the right to take and hold possession of the land, only by the exercise of its power of eminent domain, then the action may be transferred to the clerk of the Superior Court of New Hanover County, in order that the sum to which defendants who are owners of the land are entitled as just and adequate compensation may be ascertained in accordance with the provisions of chapter 33 of the Consolidated Statutes insofar as said provisions are applicable. *S. v. Lumber Co., post,* 199. Every right which the defendants or any of them have in or to the land described in the complaint can be and will be fully protected in this action. It is expressly provided by the statute under which the relator is prosecuting this action (section 2, chapter 44, Public Laws of North Carolina 1927), that "all sums which may be assessed in favor of the owner of any property condemned hereunder, shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full, but the judgment in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and estate in and to such land and property when entered." Thus the faith and credit of the State is pledged for the payment of any sum or sums which may be assessed in favor of the defendants as compensation for the land taken by virtue of this action, if it shall be adjudged that said defendants are entitled to compensation. We, therefore, hold that there was no error in the refusal of the court to dismiss this action.

The order from which defendants have appealed, as we construe its provisions, is only to the effect that the State of North Carolina has the right to the immediate possession of the land described in the complaint, for the purpose desired, and that it shall hold such possession under such title as the court may hereafter determine, in this action, the State of North Carolina has to said land when the issues of law and of fact arising on the pleadings have been tried and decided. The order does not undertake to decide these issues.

Many interesting and important questions are discussed in the briefs filed on this appeal. We are of the opinion that these questions are not now presented for discussion or for decision. We have, therefore, not discussed or decided them. As we find no error in the order entered in this action, it is

Affirmed.

W. D. RUSHING v. THE TEXAS COMPANY, A. S. GREIR AND ROBERT BYRD.

(Filed 2 July, 1930.)

1. **Negligence A c—Lessee held liable for injuries resulting from negligent construction by it of addition to filling station.**

Where the owner of land erects a filling station thereon according to specifications of an oil company, and upon its completion leases it to the oil company under a lease giving the oil company full direction and control of the premises, and the lessee makes an agreement with another for the operation of the station, and constructs an addition thereto in a negligent manner so that the vent pipe from the gasoline storage tank discharges fumes therefrom into the addition, resulting in injury to the plaintiff from an explosion occurring from the ignition of the fumes from his lighted cigar when he entered the addition: *Held*, the sole duty of the one operating the station for the lessee being to sell gasoline and oil for the lessee, and the lessee retaining full direction and control of the station, the operator was a mere licensee of the lessee, and the lessee is liable in damages proximately caused by the construction of the addition to the filling station in such negligent manner.

2. **Same—In this case held: plaintiff was not guilty of contributory negligence barring recovery as a matter of law.**

Where the lessee of a filling station through its agent in charge has customarily permitted its male customers to use the ladies' rest room and smoke therein, and by reason of its negligent construction, a male customer is injured by the explosion of gas fumes ignited by his lighted cigar, contributory negligence of the customer in his action for damages will not be held as a matter of law upon the defendant's motion as of nonsuit on the evidence.

3. **Negligence D c—Nonsuit in this case held properly denied.**

Where there is evidence that a customer of a gasoline filling station is injured by the negligence of the defendant, the defendant's motion as of nonsuit is properly denied, the evidence of plaintiff's contributory negligence as a matter of law being insufficient to bar his recovery.

APPEAL by defendant, the Texas Company, from *Moore, Special Judge,* at December Term, 1929, of MECKLENBURG. No error.

This is an action to recover damages for personal injuries sustained by plaintiff when he was hurled from the rest room at a filling station in Mecklenburg County, by an explosion in said rest room, of gas vapors which had accumulated therein, as the result of the negligence of the defendants. Each of the defendants denies the allegations of negligence in the complaint, and in the answer filed by said defendant, alleges that plaintiff by his own negligence contributed to his injuries.

The rest room had been constructed and was maintained for the convenience and accommodation of customers of the filling station. When the plaintiff entered the rest room, he was a customer of the filling station. After purchasing gasoline from the operator of the filling station for use in his automobile, he lighted a cigar; he was smoking the cigar when he entered the rest room. Almost immediately after he closed the door of the rest room, a blue flame, like lightning, ran all over the room. This was followed by a terrific explosion, which blew down the brick walls of the rest room, and hurled plaintiff with great violence a considerable distance from the building. As the result of the explosion, plaintiff sustained painful and permanent injuries, by reason of which he has suffered damages.

The filling station was owned by the defendant, A. S. Greir; prior to the explosion, he had leased the premises to the defendant, the Texas Company, for a term of three years. The date of the lease which was in writing was 1 May, 1926; the explosion occurred on 15 September, 1928. On said date the defendant, Robert Byrd, was in possession of the premises, and also of the fixtures, equipment and facilities used in the operation of the filling station, which were owned by the Texas Company, under a license agreement which is also in writing. By the terms of the license agreement, the Texas Company reserved the right as licensor to enter upon the premises, and to make such additions, alterations and substitutions as it should deem necessary. No change, alteration or substitution could be made by the defendant, Robert Byrd, as licensee, without the consent in writing of the Texas Company. As licensee he had the right only to use the premises, and the fixtures, equipment and facilities thereon for the purpose of operating the filling station and storing, handling and selling therein petroleum products purchased by him from the Texas Company.

In his complaint, plaintiff alleged that the accumulation of gas vapor in the rest room was caused by the negligence of the defendants, either in permitting an open can containing gasoline to remain in the rest room for several hours, or in so constructing and maintaining the said rest room that it enclosed a vent pipe which extended from the tank underneath the filling station, in which was stored a large quantity of gasoline, into the rest room, with the result that gas vapors arising from the gasoline in the tank were discharged into the rest room, and permitted to accumulate therein.

The rest room was constructed after the date of the lease from the defendant A. S. Grier to the defendant, the Texas Company, and after the defendant Robert Byrd had entered into possession of the premises, and of the fixtures, equipment and facilities furnished by the Texas Company. It was so constructed that it enclosed the vent pipe which was erected on the outside wall of the filling station. The gas vapors from the gasoline in the tank were discharged into the rest room, between the ceiling and the roof. The ceiling was not tight and the only window in the room was closed. About fifteen minutes before the explosion, four hundred gallons of gasoline had been put into the tank under the filling station from one of the trucks of the Texas Company. At the time of the explosion there were a thousand gallons of gasoline in the tank.

When the plaintiff rested his case, he had offered no evidence tending to show that the can which the defendant Robert Byrd had permitted to remain in the rest room for several hours prior to the explosion contained gasoline in any appreciable quantity. His motion for judgment as of nonsuit was allowed, and the action as to him was dismissed.

The motion of the defendant, A. S. Greir, at the close of the evidence for the plaintiff, for judgment as of nonsuit was also allowed, and the action as to him was also dismissed.

The issues arising upon the pleadings in the action, thereafter submitted to the jury, were answered as follows:

"1. Was the plaintiff injured by the negligence of the Texas Company as alleged in the complaint? Answer: Yes.

2. Did the plaintiff by his own negligence contribute to his injury? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $7,500."

From judgment on the verdict that plaintiff recover of the defendant, the Texas Company, the sum of $7,500, and the costs of the action, the said defendant appealed to the Supreme Court.

J. D. McCall for plaintiff.

A. E. Van Dusen, Whitlock, Dockery & Shaw and J. H. McLain for defendant.

CONNOR, J. On its appeal to this Court, the defendant, the Texas Company, relies chiefly on its contention that there was error in the refusal of the trial court to allow its motion, at the close of all the evidence, for judgment as of nonsuit, dismissing the action as to said defendant. This contention cannot be sustained if there was evidence at the trial tending to show that plaintiff was injured, as alleged in his complaint, by an explosion of gas vapors which had accumulated in the rest room, which he had entered as a customer of the filling station; and that said gas vapors had accumulated in said rest room as the result of the negligence of the defendant as alleged in the complaint. If there was such evidence, there was no error in the denial of defendant's motion, unless upon all the evidence, plaintiff by his own negligence, as alleged in the defendant's answer, contributed to his injuries, and is therefore barred of recovery in this action.

There is no serious contention on the part of the defendant that plaintiff was not injured by an explosion of gas vapors which had accumulated in the rest room, as alleged in the complaint; nor is there any serious contention that there was no evidence tending to show that said gas vapors had entered said rest room by means of the vent pipe which was enclosed when the rest room was constructed. It is admitted that the vent pipe was constructed for the purpose of permitting gas vapors which arose from the gasoline in the tank, to escape from the tank into the open air. Upon all the evidence, it was negligence to so construct the rest room that the vent pipe discharged the gas vapors which arose from time to time from the gasoline stored in the tank, into the rest room, and not into the open air. The rest room was constructed after the owner of the filling station had leased it to the defendant, the Texas Company, and after the said defendant had put the operator of the filling station in possession of the premises, and of the fixtures, equipment and facilities which said defendant owned and furnished to the said operator, by virtue of the terms of the license agreement. There was evidence tending to show that the rest room was constructed by the owner of the filling station, at the request of and in accordance with plans prepared and approved by the defendant, the Texas Company. The question, therefore, presented for decision is whether there was evidence tending to show that the defendant, the Texas Company, negligently constructed the rest room, and is therefore, in the absence of contributory negligence on the part of the plaintiff, liable for the damages which resulted to him from his injuries.

The relationship between the defendant, the Texas Company, and the operator of the filling station, with respect to the premises, and the fixtures, equipment and facilities thereon, at the date of the construction of the rest room, was not that of landlord and tenant; it was that of licensor and licensee. The decisions of this Court and of courts of other jurisdictions, cited and relied upon by the defendant in its brief filed in this Court, with respect to the liability of a landlord to a third person for damages resulting from injuries caused by the defective condition of the premises, while in possession of the tenant, have no application in the instant case. Ordinarily, the tenant alone is liable for such damages, for the reason that during the term of the lease he is entitled to the exclusive possession and control of the premises. In the instant case, however, the operator of the filling station, in possession not as tenant, but as licensee, had no right to make any addition, alteration or substitution on the premises or in the fixtures, equipment or facilities, put in his possession by the defendant, the Texas Company, not as landlord, but as licensor. The said defendant alone had the right to make additions, alterations and substitutions. This right was expressly reserved by the defendant in the license agreement. As the defendant, the Texas Company, alone had the right to have the rest room constructed, while the operator of the filling station was in possession of the premises, it alone is liable for damages resulting to plaintiff from its negligent construction.

It cannot be held as a matter of law that plaintiff was negligent when he went into the rest room with a lighted cigar, or that he was negligent, upon the facts which the evidence tended to show, in going into the rest room, which was designed for the use of ladies. There was evidence tending to show that he and other men, customers of the filling station, had frequently used this rest room, upon the invitation or with the consent of the operator of the filling station, and that plaintiff often smoked while in the rest room.

There was no error in the refusal of the trial court to dismiss the action, on the motion of defendant, at the close of all the evidence. Nor was there error in the instructions of the court to the jury to which defendant excepted and which it assigned as error on this appeal. The judgment is therefore affirmed.

No error.

STANDARD MOTORS FINANCE COMPANY AND INTERSTATE TRUST AND BANKING COMPANY v. CHARLES W. WEAVER, E. S. KOON AND CENTRAL BANK AND TRUST COMPANY, TRUSTEE.

(Filed 2 July, 1930.)

Mortgages C d—Personalty acquired by mortgagor under registered conditional sales contract and installed in premises is not subject to mortgage.

Where personal property is sold under a conditional sales contract which is registered in the book of chattel mortgages, it does not change its character as personalty by being annexed to a building for the purpose of its use, and such property is not subject to the lien of a prior registered mortgage on the real property, and upon foreclosure of the mortgage on the realty, the purchaser at the foreclosure sale is not entitled to the personalty as against the holder of the conditional sales contract, and it will not avail the purchaser that the registration of the conditional sales contract was solely in the chattel mortgage book, and that he had no notice thereof from an inspection of the book of real estate mortgages.

CIVIL ACTION, before *Finley, J.*, at December Term, 1929, of BUNCOMBE.

The evidence tended to show that on 14 March, 1927, C. W. Weaver was the owner of certain property on Hilliard and Grove streets in the city of Asheville, and that a brick building had been erected on said property and used by Weaver in the prosecution of his automobile business. On 14 March, 1927, C. W. Weaver and wife executed a deed of trust upon said property to Central Bank & Trust Company, trustee, to secure a certain indebtedness therein described. Said deed of trust was duly recorded. Thereafter, on 10 May, 1927, Weaver purchased a sprinkler system for said building and executed a conditional sales contract or title retaining agreement to the plaintiff for said sprinkler system. This conditional sales contract retained the title to the property until the purchase price had been paid in full and was duly recorded on 16 July, 1927, in the office of the register of deeds for Buncombe County, in Chattel Mortgage Book 116, page 403. Weaver failed to pay the indebtedness secured by the deed of trust upon the real estate and the Central Bank & Trust Company, trustee, under and by virtue of power contained in said deed of trust, sold the real estate at public auction on 24 October, 1928. At the sale the defendant E. S. Koon became the purchaser of the property and deed was duly executed and recorded conveying title to the real estate to said E. S. Koon. On 26 October, 1928, Koon executed a deed of trust to the Central Bank & Trust Company, trustee, to secure the payment of a certain indebtedness described in said deed of trust.

Thereafter on or about 25 February, 1929, the plaintiff instituted suit against the defendants, alleging that the purchase price of said sprinkler system had not been paid by Weaver. At the same time the plaintiff issued claim and delivery papers for the purpose of seizing and taking possession of said sprinkler system. The defendant, Central Bank & Trust Company, and E. S. Koon, purchaser of the real estate, filed answers admitting that the sprinkler system was sold under a title retaining contract which had been duly recorded in the record of chattel mortgages in Buncombe County, but alleged that the sprinkler system had become an integral part of the building and real estate described in and secured by said deed of trust held by Central Bank & Trust Company as security for said notes, and said deed of trust was a lien against said building, including the property described in said complaint, superior to any lien or rights of the plaintiff, etc.

The evidence tended to show that the sprinkler system was affixed to the foundations, walls, floors, ceiling and partitions of the building by a system of pipes, automatic sprinklers and valves. The specifications for the sprinkler system were set out in the record. The jury found in response to issues submitted that the plaintiffs were not the owners of or entitled to the possession of the property, and that the defendants were not in the wrongful possession thereof. The jury further found that the defendants, Koon and Central Bank & Trust Company, took title to said property without actual or constructive notice of the plaintiff's rights.

The trial judge instructed the jury to answer the issues in favor of defendants upon the ground that the conditional sales contract having been registered in a chattel mortgage book, did not constitute actual or constructive notice to a purchaser of the real estate.

From judgment upon the verdict the plaintiffs appealed.

Harkins & Van Winkle and Florence C. Martin for plaintiffs.
Bernard, Williams & Wright for defendants.

BROGDEN, J. Does a sprinkler system, sold under a conditional sales contract or retained title agreement duly recorded in a chattel mortgage book, and said system being thereafter attached to realty, covered by a mortgage or deed of trust, become the property of a purchaser of the realty at public sale of the mortgaged premises under power contained in such mortgage?

C. S., 3312, provides that conditional sales of personal property shall be reduced to writing and registered in the county where the purchaser resides. Such registration has the same legal effect as the registration of chattel mortgages. This Court has held uniformly and without a break in the line of precedent that one holding a mortgage on real estate has no equitable claim to personal property subsequently annexed to the mortgaged premises, if title to the chattel has been retained by the seller. For instance, in *Cox v. Lighting Co.,* 151 N. C., 62, 65 S. E., 648, it was written: "One holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore the title of a conditional vendor of such chattels, or of a mortgage of them, before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor." In the same opinion the Court quoted with approval a ruling of the Indiana Court as follows: "Accordingly, the proposition is well sustained that one who purchases machinery with a view that it shall be annexed to or placed in a building, of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold. The same principle is adhered to, in *Dry-Kiln Co. v. Ellington,* 172 N. C., 481, 90 S. E., 564. Moreover, in *Lancaster v. Insurance Co.,* 153 N. C., 285, 69 S. E., 214, the Court said: "Under our decisions, where a vendor, as here, has sold goods, taking notes for the purchase money and delivered possession, retaining title as security, and the contract has been properly registered according to the statute, Revisal 983 (now C. S., 3312), the property, the subject-matter of the contract retains its character as personalty, both as between the parties and others claiming adversely to the lien."

Other jurisdictions have adopted the interpretation of the law given by this Court.

In *Holt v. Henley,* 232 U. S., 637, a sprinkler system was the subject of the controversy. The system was bolted to the concrete foundation of a cotton mill. The plaintiff undertook to secure possession of the property, but the action was resisted by the trustee in bankruptcy of the cotton mill. *Holmes, J.,* writing the opinion, says: "To hold that the mere fact of annexing the system to the freehold over-rode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws." The opinion cites *Cox v. Lighting Co., supra,* as authority for the position taken by the Supreme Court of the United States. Likewise in the case of *Detroit Steel Cooperage Co. v. Sisterville Brewery Co.,* 233 U. S., 712, the Court upheld the right of the seller to remove tanks from a brewery which has been placed subsequently to the execution of a mortgage upon the plant.

Assuming then, that the law is well settled that personal property attached to the freehold retains its character as personalty as between the immediate parties, the question arises: Is the purchaser of real property for value and without notice precluded from acquiring title to the chattel so annexed to the freehold? If it be conceded that the registration of the conditional sale irrevocably impresses upon the property the character of personalty, it would seem apparent that the character of the property is not changed simply by reason of the fact that the land was sold. The mere advertisement and sale of the land under a mortgage could not perform a legal miracle by turning personal property into real estate. The essential question involved, therefore, is not whether the conditional sale was recorded in a chattel mortgage book or a real estate mortgage book, but whether the property remained personalty or was transformed into realty upon the execution of the power of sale in the real estate mortgage. Consequently the character of the property and title thereto determines the controversy rather than notice derived from the kind of book the paper was recorded in. This Court held in *Causey v. Plaid Mills,* 119 N. C., 180, that the owner of an "inspecting machine" placed in a mill could show as against a purchaser for value that the machine was put in the mill for temporary use and removable at the pleasure of the owner. The theory upon which the decision rests is that the title did not pass, and hence the property became no part of the freehold.

The authorities bearing upon various aspects of the question of law involved are assembled in 13 A. L. R., 461.

We therefore hold that the property in controversy retained its character as personalty and under the facts disclosed, did not become a part of the realty. Hence the defendants are not entitled to hold the property.

Reversed.

J. ROBERT LANDRETH v. AMERICAN EQUITABLE ASSURANCE COMPANY OF NEW YORK.

(Filed 2 July, 1930.)

Insurance J a—Where violation of provision of policy does not affect loss thereunder forfeiture will not be declared.

Where under a policy of fire insurance providing for a forfeiture if any foreclosure proceedings under mortgage or deed of trust be commenced against the premises with the knowledge of the insured, foreclosure proceedings are instituted without the direct knowledge of the insured, who hearing of the advertisement of the premises for foreclosure from a third person settles with the mortgagee and has the proceedings abandoned, and thereafter loss by fire is sustained during the life of the policy: *Held*, under a reasonable construction of the provisions of the policy, a forfeiture will not be declared, the insured having no direct knowledge of the foreclosure proceedings, and the loss occurring after the settlement with the mortgagee the risk under the policy was not affected at the time of the loss by the violation of the provision, and the policy was revived upon the discontinuance of the violation.

APPEAL by plaintiff from *Lyon, Emergency Judge,* at November Term, 1929, of GUILFORD. Reversed.

This is an action brought by plaintiff to recover on a $3,000 policy issued by defendant to plaintiff on a dwelling-house that was destroyed by fire.

The policy, No. 192184, was issued by defendant to plaintiff on 24 February, 1928, and was for the term of one year. The premium—$27.90—was duly paid by plaintiff to defendant. The plaintiff alleged that the policy was in full force and effect at the time the property insured was burned and all the terms, provisions and conditions contained in the policy were duly complied with on his part. That the loss suffered was $3,000; demand for payment made and refusal by defendant.

The defendant in answer sets up as a defense that the policy was a standard form and that certain of its provisions were violated, as follows:

"This entire policy shall be void, unless otherwise provided by agreement, in writing, hereto (ownership), etc.: (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

There was no agreement in writing or otherwise waiving or changing or in any way referring to the foregoing provisions (a), (b), (c), (d) and (e); nor was there any reference in the policy, by endorsement or otherwise, to any mortgage or deed of trust or other encumbrance upon the insured property nor to the ownership thereof by the insured and his wife by the entireties."

The plaintiff introduced evidence of estoppel *in pais* and waiver of the policy provisions. Upon the close of plaintiff's evidence, and at the close of all the evidence, defendant made motions as in case of nonsuit. At the close of all the evidence the court below granted defendant's motion as in case of nonsuit. C. S., 567.

The plaintiff duly excepted, assigned error and appealed to the Supreme Court.

Harry R. Stanley for plaintiff.
Frank P. Hobgood for defendant.

CLARKSON, J. "It is the well settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom." *Morris v. Y. & B. Corp.*, 198 N. C., at p. 708.

The defendant in its brief frankly says: "As to whether the foregoing facts were made known to defendant's local agent, an incorporated insurance agency which issued the policy, is for the purpose of this review of a judgment of nonsuit precluded by the testimony of plaintiff who swore that he gave the agent the information. The circumstance that the agent denied that the information was given is upon this review immaterial. Defendant, appellee, contends that its argument 'May be compressed within a narrow compass. The policy provides that it 'shall be void,' 'if the knowledge of the insured . . . notice (be) given of sale of any property insured hereunder by reason of any mortgage or trust deed.' "

This presents the lone question on this appeal. The defendant's argument on this aspect was interesting and persuasive, but not convincing. Only one aspect of law we will consider. The land was advertised for sale under the mortgage. The testimony of plaintiff in regard to this was as follows: "Q. Well, you knew on 18 June, 1928, that W. W. Hobbs and wife began to advertise all of this property for sale under the power of sale in the mortgage from Mr. and Mrs. Lowdermilk to them? A. I was told one day about this, and I settled with Mr. Hobbs. I was told about it, but I had no notice of it. Q. You knew it was advertised for sale? A. I found it out, and then settled with him the day I found it out. I settled with him on another piece of property and I paid the cost of the advertisement. I never did see the advertisement which appeared in the *Greensboro Patriot* on 25 June, 1928. My father-in-law told me it was running one morning, and I settled it that very day."

The language of the policy, "The entire policy shall be void . . . if with the knowledge of the insured foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed." The question arises if plaintiff's testimony is found to be true by the jury is the policy void? We think not. The record discloses that the advertisement was started 15 June, 1928, and the sale to take place 21 July, 1928; that the property was destroyed by fire on 24 August, 1928. Before any sale of the property plaintiff, when informed by his father-in-law, immediately settled with the mortgagees and the advertisement of sale was discontinued. The provision in the policy has relation to the fact that when a sale is commenced with the knowledge of the insured, the risk is thereby increased, as the temptation arises to burn the property to procure the insurance money, so as to discharge the lien. The plaintiff immediately on getting outside information, other than certain and direct information from the mortgagees or their attorneys that the land would be advertised, which a reasonable construction of the policy seemed to require, settled the matter. A forfeiture under the facts and circumstances of this case would be too narrow and technical and contrary to the spirit of the provisions of the insurance policy.

We think this case is governed by *Horton v. Insurance Company,* 122 N. C., at p. 502-3. It is there said: "This brings before us a pure question of law, founded upon the charge of the court, in which we see no error. Admitting the validity of a provision rendering the policy void upon a contingency beyond the control of the assured, the only reasonable construction we can give to it is that it was intended to compel the assured to give notice to the company of any such proceedings or advertisement so that the company could exercise its right to declare the policy void, and return the unearned premium, which it was required to do by the very terms of the policy. But the assured could not be required to give information which she did not possess, and which came to her only in the same manner and through the same means that it came to the agent of defendant, whose knowledge is in law that of the defendant. It is probable that, as the agent lived in the same town where the newspaper was published, he saw the advertisement before the plaintiff, who lived in a different town. In any event she has violated no provision of the contract of insurance either in letter or in substance, as the notice of sale *was given without* her knowledge. If the defendant stands upon the letter of the contract, ignoring the equities of the plaintiff, he must be satisfied with what is given him by a literal interpretation. If he demands his full pound of flesh, he must take that and nothing more."

The cases, pro and con, are annotated in 50 A. L. R., p. 1122 *et seq.* The case of *Hayes v. Insurance Co.,* 132 N. C., 702, may be distinguished on the ground that the mortgagee under the terms of the policy gave notice of the sale to the insured as contemplated by the policy. The fire in that case occurred during the period that the property was being advertised for sale. The sale took place 3 December, 1900, and the fire occurred 1 December, 1900. In the present case, the loss by fire occurred some two months after. We think the *Horton case* is the logic of the situation and authority in this case.

In *Cottingham v. Insurance Co.*, 168 N. C., at p. 260, we find: "The loss occurred as above stated, after the deed of trust was paid off and canceled. 2 Cooley Ins., 1780, citing many cases, says: 'The general rule that a breach of the condition against encumbrance is ground for forfeiture must be modified where the encumbrance is merely temporary and is not in existence at the time of the loss. It may be regarded as settled by the weight of authority that the effect of the encumbrance is merely to suspend the risk, and on cancellation or discharge of the encumbrance the policy is revived.' Elliott on Insurance, sec. 205, collating the authorities, also says: 'The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation of the policy, and the violation was such that the company could, had it known of it at the time, have declared a forfeiture therefor.' To same purport, Phillips on Insurance, sec. 975, and 1 May Insurance (3 ed.), sec. 101; 2 A. and E., 288, and note. A case almost exactly in point is *Strause v. Insurance Co.*, 128 N. C., 64, where the defendant set up a defense that the mill was operated at night, contrary to the provisions of the policy, and this Court said: 'The fire occurred more than three months thereafter and was in no wise traceable so far as the evidence shows, to the work at night, which had long ceased.' "

We think perhaps there was sufficient evidence of knowledge on the part of defendant's agent as to the advertisement and the fact that no steps were taken to cancel the policy and some time elapsed before the fire, but this is immaterial. This matter has been recently written about in *Smith v. Insurance Co.*, 198 N. C., 578. The judgment of the court below is

Reversed.

J. L. CROUSE v. R. T. STANLEY AND GUY L. DAZEY, TRADING AS STANLEY & DAZEY ET AL.

(Filed 2 July, 1930.)

Principal and Surety B a—Surety is entitled to credit of actual loss sustained by him by reason of insured's failure to retain percentage.

Where a contractor for the erection of a building sublets the painting thereof under a contract providing for payment to the subcontractor as the work progresses, reserving a balance until the completion of the work, upon the default of the subcontractor and the completion of the work by the contractor who had failed to retain the specified percentage: *Held,* the surety on the subcontractor's bond is discharged and relieved upon equitable principles of his liability on the bond to the extent of his actual loss occasioned by the failure of the contractor to retain the required percentage and no further, the surety being entitled to the retained percentage if it had been forced to complete the contract under the terms of the bond, and upon such facts a judgment sustaining the surety's demurrer on the theory that the surety was released, will be reversed in order that the rights of the parties may be determined.

STACY, C. J., and CONNOR, J., dissent.

CIVIL ACTION, before *McElroy, J.,* at January Civil Term, 1930, of GUILFORD.

The plaintiff is a contractor living in Guilford County, North Carolina, and on 1 November, 1917, made a contract to erect a high school in the city of Tampa, State of Florida.

The defendants were partners and engaged in the business of painting contractors.

On 1 November, 1927, the plaintiff entered into a contract with the defendants to the effect that the defendants would furnish all materials and perform all work necessary to complete the painting of the high school at Tampa, Florida. The contract price for said work was $20,000, and required the giving of a surety bond to guarantee the faithful performance thereof. Thereupon, the defendants secured a bond from the Fidelity and Casualty Company of New York in the penal sum of $10,000.

The subcontract between the plaintiff and the defendants provided that payments should be made as follows: "80 per cent of all labor and material which has been placed in position by said subcontractor, to be paid on or about the first of the following month, except the final payment, which the said contractor shall pay to the subcontractor within thirty days after the subcontractor shall have completed his work to the full satisfaction of said architect."

The plaintiff alleged and offered evidence tending to show that the defendants abandoned the contract "making it necessary for the plaintiff to take over the work and complete the same." There was evidence tending to show that the defendants abandoned the contract on or about 4 October, 1928, and notice was given to the Surety Company by the plaintiff on or about 8 October, 1928.

The plaintiff brought a suit against the defendants, Stanley & Dazey, subcontractors, Greensboro Paint Company, the Fidelity and Casualty Company of New York, and J. E. Comer. The amount claimed was $6,060.12, which said claim was made up of the following items: "(a) cost of completion in excess of contract price, $2,425.38; (b) 60 days delay at $20 per day, $1,200; (c) cost of materials, $2,434.74; total, $6,060.12."

The defendant, Stanley & Dazey, filed an answer denying the right of plaintiff to recover and alleging a counterclaim in the sum of $3,500. The defendant, Surety Company, filed an answer denying liability and alleging that it was released as bondsman for the subcontractors for the reason that plaintiff contractor failed and neglected to preserve the retained percentage of twenty per cent.

Upon this contention the evidence tended to show that the retained percentage would have amounted to approximately $4,202.82.

The evidence further showed that the plaintiff had paid to the defendants or to banks and other parties for the benefit of defendants approximately the entire contract price. The plaintiff, admitting that the retained percentage was not preserved, explained that he "had guaranteed bills for them. I did not keep in hand twenty per cent until the work was finished and completed, for I could not under the conditions."

At the conclusion of the evidence the trial judge sustained the motion of nonsuit made by the defendant, Casualty Company, and other defendants, retaining the cause as to the defendant, Stanley & Dazey.

The jury answered the issues against the contentions of defendant, Stanley & Dazey, and awarded the plaintiff the sum of $6,060.12.

No evidence was offered connecting the defendant, Greensboro Paint Company, or J. E. Comer with the controversy.

From the judgment of nonsuit as to the Fidelity and Casualty Company of New York, plaintiff appealed.

Brooks, Parker, Smith & Wharton and E. J. Honson for Paint Company.

Frazier & Frazier and R. M. Robinson for plaintiff.

Ruark & Ruark for Fidelity and Casualty Company.

BROGDEN, J. Did the failure of the plaintiff to preserve and hold the retained percentage release the defendant surety from any and all obligation upon its bond?

The legal status of retained percentage in contracts of the kind involved in this controversy has been thus declared in *Insurance Co. v. Durham County,* 190 N. C., 58, 128 S. E., 469: "The contract provision that 85 per cent of the value of labor and material used during the previous month, as estimated by the architect, shall be paid by the owner to the contractor at the dates specified during the progress of the work creates in the 15 per cent reserve balance an equity in which the surety has a substantial right. While the owner also has an equity in this reserved balance, he has no right, without the consent of the surety to waive it, or to exceed the provisions of the contract in making payments to the contractor. The retained balance is well calculated to induce the contractor to complete the building, and it is valuable security against loss when a breach occurs." *Prairie State Bank v. U. S.,* 164 U. S., 227, 41 L. Ed., 412; *Hamilton v. Republic Casualty Co.,* 135 S. E., 259; Williston on Contracts, Vol. II, sec. 1243.

Williston, *supra,* summarizing the decisions upon the subject, states: "Such payments in larger amounts, or at earlier times than the contract between the principal and his employer fixed discharges the surety. But the basis of the rule is equitable, and it should not be pushed beyond equitable limits, and especially in recent years the courts have shown a tendency to hold the surety where it sufficiently appears that the overpayment of the principal has caused no loss."

An examination of the authorities bearing upon the subject discloses that the courts have adopted various attitudes with respect to the application of the principle of releasing the surety from his obligations. First, some courts have held that, if the owner overpays the contractor upon forged or mistaken estimates or by reason of fraudulent substitution of inferior materials, the surety is not thereby released. *Van Buren County v. American Surety Co.,* 115 N. W., 24; *Wakefield v. American Surety Co.,* 95 N. E., 350. Second, if the excess payments are made to satisfy the valid claim of laborers and materialmen who are included within the terms of the bond, the surety is not relieved. *U. S. Fidelity and Guaranty Co. v. Trustees of Baptist Church,* 102 S. W., 325. Third, a surety is not discharged by overpayment unless it is shown that such overpayment resulted in loss. *Lloyd Investment Co. v. Illinois Surety Co.,* 160 N. W., 58; *Maine Central R. R. Co. v. National Surety Co.,* 94 Atl., 929. Fourth, if the owner fails to retain the specified percentage, the surety is discharged *pro tanto* upon the theory that such reserve percentage creates a right in the surety to apply the same in exoneration of the loss sustained by the failure to pay laborers and materialmen. *Mfg. Co. v. Blaylock,* 192 N. C., 407, 135 S. E., 136.

This Court has adopted the *pro tanto* theory; that is to say, that in contracts of the kind involved in this case, the surety in obedience to equitable principles is discharged and relieved to the extent of the loss actually suffered and no further. Therefore, the final determination of the rights of the parties depends upon whether the surety suffered a loss in the case at bar. When Stanley & Dazey defaulted it was the duty of the defendant surety company to complete the work in accordance with the terms of the contract. If the owner had complied with the agreement entered into between the parties he would then have in hand to turn over to the surety the sum of $4,202.80, and thereupon the surety would be entitled to said sum to apply upon the completion of the work. No such amount was available, and thus the surety was deprived of a credit to which it was entitled under the law.

No evidence was offered connecting the defendant, Greensboro Paint Company, or the defendant, Comer, with the transaction, and the judgment of nonsuit as to such defendants is upheld. The judgment of nonsuit as to defendant surety company is reversed, and the cause remanded for trial in accordance with the rules of liability declared in this opinion.

Reversed.

STACY, C. J., and CONNOR, J., dissent.

THELMA MOSS, BY HER NEXT FRIEND, SMITH MOSS, v. GEORGE E. BROWN AND GEORGE Y. KLUTTZ,

AND

BERNICE MOSS v. GEORGE E. BROWN AND GEORGE Y. KLUTTZ.

(Filed 2 July, 1930.)

Trial E c—Where question of proximate cause is material in an action, failure to instruct jury as to law thereon is reversible error.

Where the question of proximate cause is essential and material, and arises from the evidence in an action to recover damages for the negligent infliction of a personal injury, the failure of the trial court to correctly charge the jury thereon is error, and the omission being to a substantial and material feature of the cause, the defendant is entitled to a new trial without having made a special request therefor, C. S., 564, and where the judge of the Superior Court, upon appeal from judgment of a municipal court has reversed and remanded the cause for such error, upon appeal to the Supreme Court the judgment of the lower court will be affirmed.

APPEAL by plaintiffs from *Moore, J.,* at August Term, 1929, of GUILFORD. Affirmed.

These actions were tried in the municipal court of the city of High Point, before Lewis E. Teague, judge of the municipal court and a jury. The actions were consolidated by consent. The actions were for actionable negligence and damages.

The allegations of plaintiffs were to the effect that on 20 May, 1926, they were passengers riding in an automobile driven by one Smith Moss and the defendants, owners of a hearse driven by defendant, Kluttz, recklessly, carelessly and negligently ran the hearse into the automobile injuring them.

The defendants denied the allegations of plaintiffs as to negligence and set up in their answer: "The defendants specifically deny that they were careless and negligent in any particular, and allege and contend that, the rate of speed with which Smith Moss was operating his automobile just prior to the accident and at the time of the accident and his careless driving and his carelessness and negligence were the direct and proximate cause of the injuries sustained by the plaintiffs, Thelma Moss and Bernice Moss."

The evidence on the part of plaintiffs was to the effect: That Smith Moss was their brother, driving an Essex car, and they were passengers in his car. They were on the way to Albemarle and passing through the town of Rockwell, where the collision occurred about 10:30 in the morning, in which they were injured. The hearse was headed towards Smith Moss and he driving towards it; that the hearse was either parked or going very slow, with the right wheels on the dirt, which Smith Moss could see for some distance; he was driving about 25 miles an hour on the right-hand side of the paved road. The driver of the hearse crossed the road in front of Smith Moss and in going around the right-hand side, to avoid the collision, the bumper of the hearse struck Moss' front left fender, the car swerved to the right side when the hearse struck the car, and it was thrown against a telephone pole. He had left the pavement entirely for seventeen feet from where the collision occurred.

Mrs. T. H. Rhinehart testified in part: "I saw the hearse leave defendant Brown's yard and it passed by my home on the right-hand side of the road, going west in the direction of Salisbury. Mr. Kluttz was driving. The right wheel got off of the hard surface a precious little before they made a left turn going into their place of business. They gave no signal. Mr. Moss was driving about 30 or 35 miles an hour. Mr. Kluttz told me that he did not see Mr. Moss. . . . At the time I saw Mr. Moss on top of the knoll the front wheels of the hearse had reached a place which was about the center of the highway. The front of the Essex hit the telephone pole."

The defendant's evidence contradicted that of plaintiffs. Defendant Kluttz testified in part: "I had driven the hearse from Mr. Brown's yard and had reached the point to turn across the road, and when I started to turn there was no car meeting us in sight. I stuck my left hand out of the window of the hearse and looked ahead. I was half way across the road or pavement when Moss's car reached the top of the knoll. That is, our hearse was headed south diagonally across the road, and would say that Moss was 175 feet away. If Moss had been looking our hearse would have been in view to him something like 300 feet. Don't know how fast Moss was driving, but when he slid by our bumper he was going plenty fast, running at least 20 or 25 miles an hour when he slid by our bumper." The occurrence took place in the town of Rockwell. There was evidence to the effect that both parties were violating the law of the road.

The issues submitted to the jury and their answers thereto were as follows:

"1. Were Bernice Moss and Thelma Moss injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

2. What amount of damage, if any, is Bernice Moss entitled to recover? Answer: $1,800.

3. What amount of damage, if any, is Thelma Moss entitled to recover? Answer: $3,500."

The defendants made numerous exceptions and assignments of error to the trial in the municipal court of the city of High Point.

This municipal court was established in 1913, chapter 569, Public-Local Laws. In 1927 it was given power to try civil actions. Public-Local Laws, ch. 699; see amendment Public-Local Laws 1929, ch. 170.

Under the 1927 act, sec. 5(j): "That appeals may be taken by either the plaintiff or the defendant in civil actions or by the defendant in any criminal action and by the State in such criminal action as the State is allowed appeals from the Superior Court from the High Point municipal court to the Superior Court of Guilford County in term time for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court. . . . That upon appeals from the High Point municipal court, the Superior Court may either affirm, modify and affirm the judgment of the High Point municipal court, or remand the cause to the High Point municipal court for a new trial," etc.

Upon appeal to the Superior Court, the court below rendered the following judgment: "This cause coming on to be heard, and being heard upon motion of the defendants for reversal of judgment rendered in the municipal court of High Point, the defendants basing their motion upon the grounds of errors committed by the judge of the municipal court of High Point in his charge to the jury, and it appearing from the record in this cause that the defendants set up the plea of the negligence of Smith Moss, the driver of the automobile in which the plaintiffs were guests, as the sole and proximate cause of the injuries sustained by plaintiffs, and it appearing to the satisfaction of the court that in the charge to the jury the judge of the lower court failed to charge the jury on the question of law based upon the facts and evidence, and that this error is fatal, and that the judgment rendered in the municipal court of High Point should be reversed, and the cause remanded to the municipal court of the city of High Point for trial *de novo:* It is, therefore, ordered, adjudged and decreed that the judgment rendered in the municipal court of the city of High Point be reversed and the same is hereby reversed, and the cause remanded to the municipal court of the city of High Point for trial *de novo:* It is further ordered, adjudged and decreed, that costs of appellee be taxed against the plaintiffs by the clerk of this court." The defendants excepted, assigned error and appealed to the Supreme Court.

C. C. Barnhardt, King, Sapp & King and Walder & Casey for plaintiffs.

Gold, York & McAnally and R. Lee Wright for defendants.

CLARKSON, J. From the judgment by the court below, we think the only question involved in this appeal: Did the court below commit error in holding that the judge of the municipal court failed to charge the jury on the question of law based upon the evidence, in that he failed to tell the jury that plaintiffs could not recover if the negligence of Smith Moss was the sole and only proximate cause of plaintiff's injury? We think not. *White v. Realty Co.,* 182 N. C., 536; *Construction Co. v. R. R.,* 184 N. C., 179.

"In *Bank v. Rochamora,* 193 N. C., at p. 8, quoting numerous authorities, the law is thus stated: 'Where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it.' This applies to subordinate elaboration, but not substantive, material and essential features of the charge. C. S., 564." *McCall v. Lumber Co.,* 196 N. C., at p. 602.

We think the judgment of the court below is in accordance with the law of this jurisdiction. The judge of the municipal court should have charged on the aspect of sole and only proximate cause as it was a substantive, material and essential feature of the controversy. C. S., 564. The judgment of the court below is

Affirmed.

STATE v. GEORGE SAULS.

(Filed 2 July, 1930.)

1. **Concealed Weapons B a — Evidence of guilt of carrying concealed weapon held sufficient to go to the jury.**

   Evidence that the defendant was arrested on the premises of another and had on his person when arriving at the jail a pistol belted to him and covered by a sweater he was wearing, and that the officers arresting him saw no weapon on him at the time of the arrest, is sufficient to take the case to the jury upon the question of his guilt of carrying a concealed weapon in violation of the statute over the defendant's contention and testimony that the weapon was not concealed, the issue being for the determination of the jury.

2. **Concealed Weapon A a—Knowingly carrying concealed weapon is equivalent to intent to conceal.**

   The knowledge of the defendant that he was carrying a concealed weapon is equivalent under the statute to criminal intent to conceal required by law for conviction, and an instruction that if the jury should find from the evidence that the defendant carried the pistol off his own premises knowing it to be concealed he would be guilty, otherwise not guilty, is not error.

3. **Concealed Weapons B b—Instruction in this case held for reversible error.**

   Where a defendant is tried for the statutory offense of carrying a concealed weapon off his own premises, and there is evidence permitting the inference that it was not concealed at or before the time of his arrest, and that later it was concealed by accident, an instruction, which in effect charges the jury that the defendant would be guilty if the weapon was not concealed at the time of the arrest, and was thereafter concealed by accident, is reversible error.

4. **Criminal Law L e—Exceptions to admission of evidence on cross-examination of defendant held without merit.**

   Exceptions by the defendant to the admission of his answers to questions asked him on cross-examination by the State are held to be without merit, the answers being to a collateral matter and favorable to the defendant, and the State being bound thereby.

APPEAL by defendant from *Clement, J.*, at January Term, 1930, of GASTON. New trial.

Defendant was indicted for carrying a concealed weapon, to wit, a pistol, off his own premises in breach of section 4410 of the Consolidated Statutes. He was convicted, and from the sentence pronounced he appealed upon error assigned.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. F. Flowers for defendant.

ADAMS, J. The statute provides that if any one, except when on his own premises, shall carry a deadly weapon concealed about his person, he shall be guilty of a misdemeanor. The essential elements of the offense are these: (1) The defendant must be off his own premises; (2) he must carry a deadly weapon; (3) the weapon must be concealed about his person.

R. C. Thompson testified that he was the chief of police of Mount Holly, and that he arrested the defendant at the house of Press Hamilton in Mount Holly; so the defendant was off his own premises. He testified that he carried the defendant to the police station and there found a pistol on his person. This is evidence that the defendant had the pistol at the time of his arrest. That it was a deadly weapon is self-evident and undisputed. When he was arrested, did the defendant have the weapon concealed about his person? There is no evidence that the officer saw the pistol at the time he made the arrest. Frank Torrence, another witness for the State, testified that he was with Thompson when the defendant was arrested, and that he first saw the pistol when it was taken from the defendant. This was at the police station. Neither of the witnesses for the State said that the weapon was not concealed when the arrest was made. Now, the statute contains this provision: "If any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be prima facie evidence of the concealment thereof." Testimony that the defendant, when arrested, was off his own premises and had the pistol in his possession was sufficient of itself to take the case to the jury—particularly in the absence of affirmative evidence on the part of the State that the weapon was not concealed.

The defendant was arrested at Hamilton's house, taken to an automobile, and carried to the police station. Thompson testified that he then found the pistol on the defendant's person, that it was on his belt in front of his body, and was concealed by his sweater which came down over it. The officers walked behind the defendant to the car, but it is hardly legitimate to infer that they were behind him when the arrest was made or that they would not have seen the pistol in the defendant's belt if it had not been concealed.

The defendant and his witness testified that the pistol was not concealed; but their testimony simply raised an issue for the jury. The motion to dismiss the action was therefore properly overruled. The significance of prima facie proof is clearly pointed out in *S. v. Wilkerson,* 164 N. C., 431.

The two exceptions to the admission of evidence on the cross-examination of the defendant are without merit. They related to a collateral matter, and the State was bound by the answers which were favorable to the defendant.

The defendant requested an instruction to the effect that the gravamen of the offense is the intention to carry the weapon concealed, and that if the defendant had the weapon on his person with no intention to conceal it, and it was not concealed prior to his arrest, he would not be guilty. The prayer was not given as tendered, but his Honor instructed the jury that intent is an essential of the crime; that there is no law against carrying a pistol if it can be seen; that the defendant was guilty if, being off his own premises, he carried the pistol concealed on his person and knew it was concealed; otherwise he would not be guilty.

There was evidence to justify the jury in finding that the defendant knew he had the pistol concealed about his person. In *S. v. Simmons,* 143 N. C., 613, the defendant proposed to testify that "he did not intend to conceal the pistol." The Court said: "He must be presumed to have intended to do that which he knowingly did. Knowledge that he was carrying the weapon concealed is equivalent, under the statute, to the criminal intent to conceal, which is required by the law to exist, there being no lawful excuse for carrying it." This principle was sufficiently explained in the present case.

In another respect, however, the charge is defective. The defendant testified that he had a pistol but it was not concealed; that he had on a sweater and that the pistol was visible at all times unless after he was arrested it became accidentally concealed for a moment. The controlling question was whether the defendant, being off his premises, had the pistol concealed about his person at the time of or prior to his arrest. Of course evidence of subsequent circumstances was competent on this point; but the charge is so worded as to admit of the defendant's conviction although the pistol was unconcealed up to the time of his arrest and was afterwards concealed by accident and without his knowledge. Whether this defense was worthy of belief was a matter for the jury, but the defendant had a right to have it submitted under proper instructions.

For the error complained of there must be a
New trial.

W. C. CAPPS, LIZZIE CAPPS, MRS. VERGIE KNIGHT, HATTIE MOODY, GRANT MOODY AND ADELE KNIGHT AND ANNABELLE KNIGHT, BY THEIR NEXT FRIEND, W. C. CAPPS, v. JIM MASSEY, CARRIE MASSEY AND LIZZIE ELLINGTON.

(Filed 2 July, 1930.)

1. **Estoppel A a—Husband is estopped by his deed to his wife of land held by them by entireties.**

   Where the husband conveys lands to his wife, the title to which was vested in them as tenants by the entireties, and the husband survives the wife, the husband and those claiming under him as his heirs at law are estopped by his deed from claiming the land.

2. **Deeds and Conveyances A f—Deed of wife not probated according to C. S., 2515 is void, and does not constitute estoppel.**

   Where the husband has conveyed to his wife his title to lands held by them by the entireties, and the wife thereafter conveys her title by deed to the husband and herself, which deed is not probated under the requirements of C. S., 2515, with respect to the finding of the probate officer that the instrument was not unreasonable or injurious to her, the wife's conveyance is void in law, and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. Art. X, sec. 6.

APPEAL by plaintiffs from *Sink, Special Judge,* at April Term, 1930, of BUNCOMBE. Affirmed.

The facts: On 12 August, 1922, the Woodfin Land Company, deeded to F. M. Knight and his wife, L. E. Knight, as tenants by the entirety, a certain lot or piece of land in Buncombe County, North Carolina.

On 30 August, 1923, F. M. Knight, the husband, made a deed to said land to L. E. Knight, his wife. .

On 8 August, 1925, L. E. Knight, the wife of F. M. Knight, made a deed to the husband, F. M. Knight and to herself, L. E. Knight, but the acknowledgment failed to comply with C. S., 2515, and failed to comply with Constitution of North Carolina, Art. X, sec. 6. The wife, L. E. Knight, died prior to the husband, F. M. Knight. All the conveyances above mentioned were duly registered.

The plaintiffs are the sole heirs at law of F. M. Knight and Vergie Knight is the widow of F. M. Knight. The defendants are the sole heirs at law of L. E. Knight. The county court decided that plaintiffs were the owners of the land and on appeal the Superior Court decided that defendants were the sole owners of the land to which the plaintiffs excepted, assigned error and appealed to the Supreme Court.

MacRae & MacRae for plaintiffs.
J. Scroop Styles and Narvel J. Crawford for defendants.

CLARKSON, J. The county court decided one way, on appeal the Superior Court decided another way, and this Court is now called upon to make the final decision. The original deed was made to husband and wife—an estate by the entireties. The husband attempted to convey his interest to the wife and then the wife attempted to convey back to the husband and herself.

We think, under the peculiar facts and circumstances of this case that the deed from the husband, F. M. Knight, to the wife, L. E. Knight, estopped F. M. Knight, who survived his wife, therefore plaintiffs the heirs of F. M. Knight, from claiming the land. The deed made by the wife L. E. Knight to her husband F. M. Knight and herself is void and no estoppel.

The *first* question involved: F. M. Knight and wife, L. E. Knight, held an estate by the entireties. Was a deed from the husband to the wife an estoppel against F. M. Knight, who survived his wife, therefore the heirs at law of F. M. Knight? We think so. There is no question that if an estate is held by the entireties by husband and wife, it is necessary for both husband and wife to join in the conveyance made to a third party.

In Thompson on Real Property, 2nd Vol. (1924), p. 953, sec. 1748, in part: "Neither husband nor wife can sever this title so as to defeat or prejudice the right of survivorship in the other. Neither can alone make a valid conveyance to a third person. So an agreement by one alone, affecting a change of the boundaries of the land, is not binding. Neither the husband nor the wife can convey the entire estate without the other joining in the conveyance." *Harrison v. Ray,* 108 N. C., 215; *Bruce v. Nicholson,* 109 N. C., 202; *Phillips v. Hodges,* 109 N. C., 248; *Bynum v. Wicker,* 141 N. C., 95; *Jones v. Smith,* 149 N. C., 318; *Bank v. McEwen,* 160 N. C., 414; *Moore v. Trust Co.,* 178 N. C., 118; *Turlington v. Lucas,* 186 N. C., 283; *Davis v. Bass,* 188 N. C., 200; *Johnson v. Leavitt,* 188 N. C., 682; *Distributing Co. v. Carraway,* 189 N. C., 420; *Trust Co. v. Broughton,* 193 N. C., 320; *Bryant v. Bryant,* 193 N. C., 372.

Without deciding whether the deed from F. M. Knight to his wife, L. E. Knight, was valid as a conveyance, the decisions would seem to give it effect as an estoppel against F. M. Knight, who survived his wife, therefore the heirs at law of F. M. Knight.

In *Hood v. Mercer,* 150 N. C., at p. 700, it is said: "While, to some extent, former decisions of this Court in respect to this estate have been modified, we have held, in recent years, that under a conveyance of land in fee to husband and wife they take by entireties, with right of survivorship, and that the interest of neither during their joint lives becomes subject to the lien of a docketed judgment. During the wife's life the husband has no such interest as is subject to levy and sale to satisfy a judgment against him. *Bruce v. Nicholson,* 109 N. C., 202; *West v. R. R.,* 140 N. C., 620. It is true that where the husband had conveyed the land by deed with warranty without the joinder of the wife, and survived her, his grantee acquired title, but this was by way of estoppel." F. M. Knight, the husband, survived the wife L. E. Knight.

This deed from F. M. Knight to his wife conveyed the husband's usufruct in the estate by the entireties. *Trust Co. v. Broughton,* 193 N. C., 320. The warranty estopped F. M. Knight, and therefore his heirs at law as to the fee.

In *Crawley v. Stearns,* 194 N. C., at p. 17, it is said: "At common law a covenant of warranty was necessary to preclude the grantor from asserting an after-acquired title; but there is authority for the position that if a deed shows that the grantor intended to convey and the grantee expected to acquire the particular estate the deed may found an estoppel, although it contains no technical covenants." *Bynum v. Wicker, supra.* See cases cited in *Davis v. Bass, supra,* at p. 206; *West v. Murphy* 197 N. C., 488.

The *second* question involved: Was the deed from L. E. Knight to her husband, F. M. Knight, void and no estoppel against her or her heirs at law? We think so. *Smith v. Ingram,* 130 N. C., 100; *Wallin v. Rice,* 170 N. C., 417; *Hardy v. Abdallah,* 192 N. C., 45.

C. S., 2515, requiring the probate officer, as a condition precedent to the validity of the conveyance to certify in his certificate of probate that, at the time of its execution and the wife's privy examination, such contract was "not unreasonable or injurious to her." This having been omitted, in the instant case, the deed in question is void as to the plaintiff. *Singleton v. Cherry,* 168 N. C., 402. See, also, *Sims v. Ray,* 96 N. C., 87; *Davis v. Bass, supra,* at p. 209; *Whitten v. Peace,* 188 N. C., at p. 302; *Best v. Utley,* 189 N. C., at p. 361; *Garner v. Horner,* 191 N. C., at p. 540; *Crocker v. Vann,* 192 N. C., at p. 429. See Article X, section 6, Constitution of North Carolina.

In *Whitten v. Peace, supra,* at p. 302-3, we find: "This Court has held, in *Norwood v. Totten,* 166 N. C., 649, that a deed executed by a wife conveying land to her husband, void for failure of the probate officer to comply with C. S., 2515, is, nevertheless, color of title, and that adverse possession by the husband under such deed for seven years will ripen into a perfect title. See, also, *Clendenin v. Clendenin,* 181

N. C., 465; *Elmore v. Byrd,* 180 N. C., 120; *Aderholt v. Lowman,* 179 N. C., 547; *Shermer v. Dobbins,* 176 N. C., 547; *King v. McRacken,* 168 N. C., 621."

This principle does not arise on the facts in this case. The judgment of the court below is

Affirmed.

STATE OF NORTH CAROLINA v. SUNCREST LUMBER COMPANY ET AL.

(Filed 2 July, 1930.)

1. **Eminent Domain C a—Demands for compensation for damages should be raised by exceptions to proceedings and not by answer to petition.**

   Where in condemnation proceedings under the provisions of chapter 48, Public Laws of 1927, as amended by chapter 220, Public Laws of 1929, for the condemnation of defendant's land for public park purposes, an amendment to the answer is filed asking damages for loss of business by reason of the condemnation: *Held,* the amounts demanded in the amended answer do not constitute a cross-action or counterclaim, but only to a demand for compensation which should be raised by exceptions aptly taken in the proceedings. As to whether cross-actions or counterclaims can be set up in condemnation proceedings instituted by the State, *quære?*

2. **Same—Upon appeal from the sustaining of demurrer to answer of respondents in condemnation, elements of compensation will not be decided.**

   On appeal from judgment sustaining the demurrer to the answer of respondents in condemnation proceedings, the Supreme Court will not decide the various elements of compensation allowable to the respondents, it being necessary that such questions be raised by exceptions aptly taken in the proceedings to assess compensation.

APPEAL by respondents from *Barnhill, J.,* at May Term, 1930, of BUNCOMBE.

Special proceeding under chapter 48, Public Laws 1927, as amended by chapter 220, Public Laws 1929, to condemn lands in the Great Smoky Mountains of Western North Carolina for public park purposes. The case was here on demurrer at the Spring Term, 1929, and is reported in 197 N. C., 4.

The body of land, described in the petition, which is sought to be condemned, consists of about 37,000 acres of timber lands located in Haywood and Swain counties, North Carolina, and is owned by the Suncrest Lumber Company, on which the Union Trust Company and Frederick H. Rawson, as trustee, hold mortgages or deeds of trust, hence their joinder as parties respondent.

The prayer for relief is that the Suncrest Lumber Company be enjoined from further cutting timber on said lands and that commissioners be appointed to fix and determine the amount of compensation respondents are rightfully entitled to receive for the lands thus taken.

The respondents answered, admitted the ownership of the lands described in the petition, but challenged the constitutionality of the legislative act under which the proceeding was instituted. (See *Yarborough v. Park Commission,* 196 N. C., 284, 145 S. E., 563.)

Later, by leave of court, the respondents filed amendments to their original answer, and set up or averred that in addition to compensation for the lands actually taken, they are entitled to damages, consequential and other, for the taking of said lands, which has already resulted and will result in great damage to their railroad, logging-road and equipment, right of way, sawmill, etc., used in connection with cutting the timber on said lands, and they asked that such damages be ascertained by the commissioners and included in their award.

To these amendments, the petitioner demurred on the ground that "said amendments to answer do not state a cause of action, in that the said amendments attempt to set up damages which are not allowed in this proceeding against the petitioner."

It was adjudged that the demurrer be sustained; and further:

"It is expressly stipulated by the court that this judgment is not intended to, nor shall it be interpreted as precluding the right of the defendants to offer competent evidence relating to the availability or accessibility of the timber on said tract of land sought to be condemned, to the markets, or of any other fact or circumstance which may tend to show its market value.

"The court holds, in sustaining said demurrer, that the respondents are not entitled to recover any compensation or damages in respect of the value of the property described in said amendments to their answer, and located outside the boundary of land sought to be condemned herein, or of respondents' sawmill business."

From this judgment, the respondents appeal, assigning error.

Attorney-General Brummitt, Assistant Attorneys-General Nash and Varser; Carter & Carter and Varser, Lawrence, Proctor & McIntyre for petitioner.

H. A. Mumma and Rollins & Smathers for respondents.

STACY, C. J., after stating the case: The amendments filed by the respondents to their original answer do no more than raise the question as to what constitutes "just compensation" for the lands condemned and for their taking. *R. R. v. Mfg. Co.,* 169 N. C., 156, 85 S. E., 390; 2 Lewis Eminent Domain (3d ed.), 1153, *et seq.* They do not amount to cross-actions or counterclaims, and are not subject to demurrer. Indeed, it may be doubted as to whether it is permissible to set up a cross-action or counterclaim in a condemnation proceeding instituted by the State. C. S., 1716; *Goldsboro v. Holmes,* 183 N. C., 203. At any rate, none has been attempted here.

Even if we should hold with the court below that the respondents, in these amendments, have alleged improper elements of damage, and there is much to be said in favor of this position, still we would only be dealing with allegations, not required to be made, and the respondents would not be estopped or deprived of the right to show proper elements of damage by proof, if they can. A prodigal pleading in a proceeding of this kind ought not to work an estoppel, unless it be regarded in the nature of a bill of particulars, which it does not seem to be. C. S., 534 and 4613; *Cropsey v. Markham,* 171 N. C., 43, 87 S. E., 950; *S. v. Wadford,* 194 N. C., 336, 139 S. E., 608.

While a statement of the rule to be applied might be desirable, it would not be controlling, if made on the present record. And we apprehend that, on the hearing, all that is alleged in the respondents' amendments to the original answer may not be admitted. But to undertake to decide the matter now would require that it be done in the light of these unchallenged allegations. Furthermore, it ought not to be presumed in advance of the rendition of the award of the commissioners that it will be unsatisfactory to either side. It is possible that the items, which the respondents now foresee as elements of damage, may be satisfactorily adjusted in the manner suggested by the trial court, or otherwise, and ordinarily it can make no difference, either to the condemnor or to the condemnee, where the award is fair and reasonable, whether it be designated "compensation" or "compensation and damage." Nichols, Power of Eminent Domain, 315. What boots it as to which expression is used, if, in the end, they both amount to the same thing? 10 R. C. L., 67. Compensation for the lands taken, and damage for their taking where such results to the landowner, may be regarded as the more accurate form of expression; but, if the award be fair to both sides—fair to the petitioner and fair to the respondent, it could serve no useful purpose to debate a question of terminology prior to the necessity of determining the rights of the parties. The phrase "just compensation," as used in condemnation proceedings, includes all that the landowner is entitled to receive as a just equivalent for the lands taken and for their taking. 2 Words & Phrases, 1355.

"As to the procedure in a case of this kind," says *Hoke, J.,* in *Selma v. Nobles,* 183 N. C., 322, 111 S. E., 543, "our decisions are to the effect that notwithstanding the appearance of issuable matter in the pleadings, it is the duty of the clerk, in the first instance, to pass upon all disputed questions presented in the record, and go on to the assessment of the damages through commissioners duly appointed, and allowing the parties, by exceptions, to raise any questions of law or fact issuable or otherwise to be considered on appeal from him in his award of the damages as provided by law," citing as authorities: *R. R. v. Mfg. Co.,* 166 N. C., 168, 82 S. E., 5; *Abernathy v. R. R.,* 150 N. C., 97, 63 S. E., 180; *R. R. v. R. R.,* 148 N. C., 59, 61 S. E., 683.

In *Abernathy's case, supra,* the method of procedure was stated by *Connor, J.,* as follows: "In condemnation proceedings the questions of law and fact are passed upon by the clerk, to whose rulings exceptions are noted, and no appeal lies until the final report of the commissioners comes in, when upon exceptions filed, the entire record is sent to the Superior Court, where all of the exceptions are passed upon and questions may be then presented for the first time," citing in support of the position: *R. R. v. Stroud,* 132 N. C., 413, 43 S. E., 913; *R. R. v. Newton,* 133 N. C., 132, 45 S. E., 549; *Porter v. Armstrong,* 134 N. C., 447, 46 S. E., 997; *Durham v. Riggsbee,* 141 N. C., 128, 53 S. E., 531.

That the landowner is entitled to compensation for the lands taken in condemnation, and damage for their taking where such results, is the rationale of all the decisions on the subject, and this is not questioned by either side. *Light Co. v. Reaves,* 198 N. C., 404, 151 S. E., 871; *Power Co. v. Hayes,* 193 N. C., 104, 136 S. E., 353; *Milling Co. v. Highway Commission,* 190 N. C., 692, 130 S. E., 724; *Power Co. v. Power Co.,* 186 N. C., 179, 119 S. E., 213; *Goldsboro v. Holmes,* 180 N. C., 99, 104 S. E., 140; *Watts v. Turnpike Co.,* 181 N. C., 129, 106 S. E., 497; *R. R. v. Mfg. Co., supra; R. R. v. Armfield,* 167 N. C., 464, 83 S. E., 809; *Phillips v. Telegraph Co.,* 130 N. C., 513, 41 S. E., 1022; *R. R. v. Church,* 104 N. C., 525, 10 S. E., 761; *R. R. v. Wicker,* 74 N. C., 220; *Johnston v. Rankin,* 70 N. C., 550; *Alloway v. Nashville,* 88 Tenn., 510, 13 S. W., 123, 8 L. R. A., 123; 20 C. J., 730. Neither is it controverted that, unless sanctioned by statute, loss of profits from a business conducted on the property or in connection therewith, is not to be included in the award for the taking. *Mitchell v. U. S.,* 267 U. S., 341, 69 L. Ed., 644; *Joslin Mfg. Co. v. Providence,* 262 U. S., 668, 67 L. Ed., 1167.

The only effect, therefore, which a dictum on the present pleadings could have, would be to indicate the test for determining the competency or admissibility of the evidence to be offered on the hearing and to chart the course of the award. This, it will be observed, is what was undertaken in the judgment below. But as we view the pleadings, it would seem that the demurrer should have been dismissed. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

Error.

MACK-INTERNATIONAL MOTOR TRUCK CORPORATION v. WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF J. H. REED, DECEASED (ORIGINAL DEFENDANT), AND E. H. REED AND NORTHERN INSURANCE COMPANY OF NEW YORK (ADDITIONAL DEFENDANTS).

(Filed 2 July, 1930.)

Parties B b—All parties necessary to final and conclusive judgment may be brought in by order of court.

Under our Code procedure the pleadings are to be liberally construed, and all necessary and proper parties having a community of interest in the subject-matter of the litigation may be brought in as parties by order of court when reasonably apparent that such is necessary to a final and conclusive judgment, and in this case *held*, the demurrer of a party thus brought in was properly overruled. C. S., 456, 460.

APPEAL by defendant, Northern Insurance Company of New York, from *Johnson, Special Judge,* at Special November Term, of BUNCOMBE. Affirmed.

J. W. Haynes for plaintiff.

Kitchin & Kitchin and Bourne, Parker & Jones for Wachovia Bank & Trust Company, Executor of J. H. Reed, deceased, and E. H. Reed.

Bernard, Williams & Wright for Northern Insurance Company of New York.

CLARKSON, J. We do not think it necessary to set forth the pleadings. The record contains 32 pages. The Northern Insurance Company of New York, was by order of the court below made a party defendant. Plaintiff filed its complaint. Defendants answered and also set up a further defense and counterclaim. Plaintiff replied and amended its complaint setting forth certain facts and alleged that the Northern Insurance Company of New York, was a proper and necessary party "to this action to the end that there may be a final determination of all matters in controversy between the respective parties in interest." By order of the court, the Northern Insurance Company of New York, was made a party defendant. It demurred—the demurrer was overruled—it excepted, assigned error and appealed to this Court. We think the ruling of the court below should be sustained. From a careful reading of the pleadings we think that the Northern Insurance Company of New York, was a necessary party to the action. Let us cite some statutes dealing with the subject:

C. S., 456: "Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, *or who is* a necessary party to a complete determination or settlement of the questions involved," etc.

C. S., 460: "The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the right of others, *but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in,*" etc.

C. S., 507: "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—(1) *The same transaction, or transaction connected with the same subject of action,*" etc.

In *Wadford v. Davis,* 192 N. C., at p. 489, speaking to the subject: "30 Cyc., p. 127, says: '*Under American Codes.* In other cases, however, and notably in recent cases, these enactments have been interpreted as permitting a very full joinder of defendants. This tendency is especially marked in actions seeking equitable relief. The provisions of The Code, it is declared, adopted the rule of equity joinder in its most liberal form. A community of interest among defendants is necessary, but it is community of interest in something wider than a precise 'subject of action' between plaintiff and each defendant—it is a community of interest 'in the controversy.' There is a noticeable tendency under The Code, as in equity pleading, to treat the rule, not as an inflexible rule of practice or procedure, but as a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation on the one hand or drawing suitors into needless and unnecessary expenses on the other.' *Oyster v. Mining Co.,* 140 N. C., 135."

In *S. v. McCanless,* 193 N. C., at p. 206, we find: "Under our Code the restrictions or joinder have been relieved somewhat by a liberal interpretation of the 'same transaction.' The modern decisions tend to freedom of joinder, and elementary restrictions on joinder of actions in both complaints and counterclaims."

In *Shemwell v. Lethco,* 198 N. C., at p. 348, it is said: "Under our Code of Civil Procedure, we have universally held that in construing pleadings for the purpose of determining its effect, its allegations are liberally construed with a view to substantial justice between the parties. This does not mean that injustice should be done to others by improper joinder of parties and causes of action. We should maintain a liberal but orderly system of practice and procedure, a jungle system would work injustice and sooner or later our practice and procedure would be a tangled web and maze. C. S., 535. *Clendenin v. Turner,* 96 N. C., 421." The judgment below is

Affirmed.

C. S. LEWIS AND J. M. BROWN, CO-PARTNERS, DOING BUSINESS IN THE NAME OF C. S. LEWIS, v. D. B. ARCHBELL, NORFOLK SOUTHERN RAILROAD COMPANY, C. F. GARNER AND C. C. FRY.

(Filed 2 July, 1930.)

Contracts A f—Plaintiff must show causal relation between violation of C. S., 2563 and injury in order to recover damages under C. S., 2574.

The statute, C. S., 2563, condemns a contract of sale only when such sale is made "upon the condition" that the purchaser shall not deal in the goods or merchandise of a competitor of the seller, and in order for a party to recover damages for a breach of the statute under the provisions of C. S., 2574, he must show a violation of the statute and a causal relation between the violation and injury to his business, and *held:* in this case, the cause should be submitted to the jury under proper instructions.

CIVIL ACTION, before *Clement, J.*, at September Term, 1929, of MOORE.

The evidence tended to show that the plaintiffs, C. S. Lewis and J. M. Brown, were engaged in buying and selling crossties in a little village known as Hemp. The defendants, Fry and Garner, were also engaged in the same business in said village. The defendant Archbell was employed by his codefendant, Norfolk Southern Railroad Company, as chief tie and timber inspector for the territory in which the village of Hemp is located. The evidence further tended to show that Fry and Garner entered into a contract with its codefendant, Norfolk Southern Railroad Company through the defendant Archbell, according to the terms of which the Norfolk Southern agreed to buy crossties at Hemp, N. C., only from its codefendants, Fry and Garner, and Fry and Garner agreed not to sell ties to any other person, firm or corporation except Norfolk Southern. The Seaboard Air Line and also the P. & N. Railroad bought ties at Hemp. There was also testimony to the effect that the defendant Garner stated that the firm of Fry and Garner had a contract with the Norfolk Southern Railroad and that in about two weeks they would "put the plaintiffs, Brown and Lewis, out of business."

Plaintiffs alleged that by reason of the contract aforesaid they were compelled to quit business at Hemp, North Carolina, and that their business was injured, broken up or destroyed.

At the conclusion of the evidence the trial judge nonsuited the action and plaintiffs appealed.

Seawell & Seawell for plaintiffs.

U. L. Spence for Norfolk Southern Railroad and D. B. Archbell.

W. R. Clegg for defendants, Fry and Garner.

BROGDEN, J. The plaintiffs and the defendants, Fry and Garner, were the sole crosstie dealers or brokers at Hemp, which is a small village. Consequently they were competitors. There was evidence tending to show that the defendants, Fry and Garner, and Norfolk Southern Railroad Company, through its agent, the defendant Archbell, entered into an agreement whereby Fry and Garner contracted to sell crossties only to said railroad company, and said company contracted to purchase ties only from Fry and Garner.

These facts raise the following question of law: Does said contract violate C. S., 2563, so as to create a cause of action for damages under C. S., 2574?

C. S., 2563, subsection 2, provides in substance that it shall be unlawful to sell any goods, wares or merchandise in this state upon the condition that the purchaser thereof shall not deal in the goods, wares or merchandise of a competitor or business rival of the seller. C. S., 2574, provides that if the business of any person shall be injured or destroyed by reason of the violation of the monopoly statute (same being C. S., 2559 to 2574 inclusive) that the party so injured shall have the right to institute an action for damages.

It is obvious that the mere violation of the statute will not warrant a recovery of damages. The burden is upon the complaining party to show by competent evidence that his business has been broken up, destroyed or injured as the proximate result of such violation. Moreover, the defendants, Fry and Garner, would have the right to contract to sell the entire output of crossties to any single purchaser and such purchaser would have the right to purchase ties from only one seller. The statute condemns the contract of sale only in the event such sale is made "upon the condition" that the purchaser shall not deal in the goods or merchandise of a competitor of the seller.

There is some evidence of a violation of C. S., 2563, subsection 2, and some evidence that the business of plaintiffs declined. Whether there be a causal relation between the violation of the statute and the injury complained of is an issue of fact for a jury; that is to say, if the defendants, Fry and Garner, being competitors of plaintiffs, agreed to sell their entire output of crossties to the defendant railroad "upon the condition" that the defendant railroad should not buy ties from the plaintiffs and as a result thereof the plaintiffs' business was broken up, destroyed or injured, the plaintiffs would be entitled to recover; but if no such contract was made, the plaintiffs would not be entitled to recover, or if such contract was made and the business of plaintiffs declined or plaintiffs were forced out of business for other reasons and not as the proximate result of contract, then in such event the plaintiffs are not entitled to recover.

However, upon the record as now presented we are of the opinion and so hold that the cause should be submitted to a jury with proper instructions from the court.

Reversed.

LOVE THOMAS HUGHES AND HUSBAND, G. E. HUGHES, v. J. R. THOMAS.

(Filed 2 July, 1930.)

Judgments Q a—In this case held: provision in judgment did not prevent its becoming unenforceable after lapse of over ten years.

Where the judgment against the defendant provides that it should be a lien on and collectible only out of the amount due the defendant out of the estate of her grandfather, it is a final judgment, and the lien of the judgment immediately attaches to the interest specified and is enforceable against the same, by execution, and where the judgment is docketed in the county where the land comprising the estate of the grandfather is situate more than ten years after its rendition, action to enforce judgment is barred by the ten-year statute of limitations, and it may not be collected out of the share of the defendant of the proceeds of the sale of the estate.

STACY, C. J., and CONNOR, J., dissent.

CIVIL ACTION, before *MacRae, Special Judge.* From SWAIN.

William H. Thomas, Sr., died intestate on or about 10 May, 1893, leaving the plaintiff, Love Thomas Hughes, as one of his heirs at law. The said intestate owned certain land and the *feme* plaintiff by virtue of her relation was entitled to a one-eighteenth undivided interest in and to the estate of said W. H. Thomas. The defendant, J. R. Thomas, qualified as administrator of the estate of W. H. Thomas on or about 30 June, 1895, and thereafter in 1916 the defendant secured a judgment against the plaintiff, Love Thomas Hughes, in the sum of $362.50, which judgment was duly docketed in Jackson County on 10 November, 1916. Thereafter on 21 May, 1929, the defendant secured a transcript of said judgment and duly docketed it in Swain County. Thereafter on or about 3 July, 1929, the plaintiff and the defendant together with other owners of certain land of W. H. Thomas sold the same to the Tallassee Power Company for the sum of $32,500. The plaintiff, Love Thomas Hughes, was entitled to receive out of the proceeds of said land the sum of $1,666.67, but the sum of $659.32 was deducted from her share of said purchase price and paid by agreement to the clerk of the Superior Court of Swain County, to be held pending a suit to test the validity of said judgment for $362.51.

The plaintiff instituted this action against the defendant alleging that, as the land sold was in Swain County and that as the judgment against her was docketed in said county more than ten years after its rendition, said judgment was not a lien upon her interest in the land and that she was entitled to receive one-eighteenth of the purchase price of said land.

The judgment rendered in November, 1916, against the *feme* plaintiff and in favor of defendant contained the following clause:

"It is further considered, ordered and adjudged by like consent and upon motion as aforesaid, that the defendant, Jas. R. Thomas, have and recover of the relator, Love Thomas (now Love Hughes), the sum of three hundred sixty-two and 51/100 ($362.51) dollars, to be a lien upon and payable out of such interest as she may have or be entitled to in the estate of her grandfather, W. H. Thomas, Sr., and payable only out of any sum which may be due or hereafter become due to her from her interest or distributive share in the said estate."

It is admitted that the judgment rendered in Jackson County in 1916 was not docketed in Swain County where the land was situated until May, 1929. But the defendant contends that the clause in the judgment above quoted prevented the running of the ten-year statute of limitations until the sale of the land.

The trial judge ruled that the defendant was entitled to judgment upon the pleadings. From such judgment the plaintiffs appealed.

Roberts, Young & Glenn for plaintiffs.
J. M. Horner, Jr., for defendant.

BROGDEN, J. Was the judgment rendered in Jackson County on 10 November, 1916, and not docketed in Swain County until May, 1929, dead when docketed?

If the judgment was dead when docketed in Swain County, then the act of docketing in such county did not breathe into it the breath of life. The defendant, however, contends that the judgment was not a final judgment for the reason that it created a lien "payable out of such interest as she may have or be entitled to in the estate of her grandfather, W. H. Thomas, Sr., and payable only out of any sum which may be due or hereafter become due to her from her interest or distributive share in the said estate." Hence the judgment contemplated a sale of property at sometime in the future and consequently the statute of limitations would not run until such sale.

We do not concur in this reasoning. The record discloses that the judgment purports to be a final judgment. The defendant could have issued an execution upon said judgment at any time. Indeed, it seems apparent that the judgment was intended to constitute a lien upon the land of *feme* plaintiff exclusively and to be interpreted and construed solely as a charge upon her distributive share. The property out of which the judgment was to be paid was then in existence and subject to execution.

As we construe the judgment, it was a charge upon the interest of said plaintiff in the land, and no more, and it is well settled in this jurisdiction that an action to enforce a charge upon land is barred by the ten-year statute of limitations. *Newsome v. Harrell,* 168 N. C., 295, 84 S. E., 337; *Cochran v. Colson,* 192 N. C., 663, 135 S. E., 794.

We are therefore of the opinion that the judgment was dead when docketed and that the trial judge erroneously rendered judgment for the defendant.

Reversed.

STACY, C. J., and CONNOR, J., dissent.

STATE v. JOHN E. COREY.

(Filed 2 July, 1930.)

1. **False Pretense A b—Under the facts of this case held: conviction of defendant of false pretense was error.**

   A conviction under C. S., 4277, for false and fraudulent representations as to the quantity of standing timber on land sold to the prosecutor cannot be sustained where the amount of the purchase price for land is to be determined by the number of feet of timber cut therefrom, the prosecutor not being damaged thereby; nor can the conviction be sustained for misrepresentations as to the quality of the trees when the prosecutor had ample opportunity to inspect them and had been urged to do so by the defendant.

2. **Criminal Law L f—Reversal of judgment of guilty has the effect of verdict of not guilty.**

   Under the provisions of C. S., 4643, the reversal of a judgment of guilty has the force and effect of a verdict of "not guilty."

APPEAL by defendant from *Nunn, J.,* at January Term, 1930, of PENDER. Reversed.

Criminal action in which defendant, John E. Corey, was tried on his plea of not guilty to an indictment charging that said defendant, unlawfully and feloniously, knowingly and designedly, did obtain from one

John H. Ott, Jr., money and other things of value by means of false and fraudulent representations as to the quantity and quality of the timber trees on a certain tract of land in Pender County, North Carolina, containing 14,411 acres, more or less, the said John H. Ott, Jr., having relied upon the truth of said representations, and having been thereby cheated and defrauded. C. S., 4277.

There was a verdict of guilty.

From judgment on the verdict, that defendant be confined in the State's prison for a term of not less than three years, nor more than five years, the defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

H. C. Carter, Herbert McClammy and Best & Moore for defendant.

CONNOR, J. The record on this appeal contains 254 pages. There are 47 assignments of error which defendant contends should be sustained. All these assignments of error, except that based on defendant's exception to the refusal of the trial court to allow his motion for judgment as of nonsuit, present defendant's contentions that there were errors in the rulings of the court upon his objections to evidence offered by the State. It may be conceded, without deciding, that there was no error in the rulings of the court with respect to the evidence. We are of opinion that there was error in the refusal of the court to allow defendant's motion, made first at the conclusion of the evidence for the State and renewed at the close of all the evidence, for judgment dismissing the action as of nonsuit. C. S., 4643.

The evidence was conflicting as to whether defendant made the representations as alleged in the indictment. All the evidence was to the effect, however, that the prosecutor did not rely upon these representations in the purchase of the timber trees on the land described in the indictment. The contract of purchase was in writing, and it appears therefrom that the prosecutor relied upon the provision in the contract that he should pay the sum of $3.00 per thousand feet for the trees cut by him from said land, not exceeding 60,000,000 feet. Under this provision, the representation alleged to have been made by the defendant, as to the quantity of the trees on the land, was immaterial. With respect to the quality of the trees, all the evidence was to the effect that the prosecutor had ample opportunity, during the negotiations which pended from February to June, to inspect the trees, and was urged to do so by the defendant. There was no reference in the written contract to the quality, or to the size of the trees.

The judgment in this action is reversed upon the authority of *S. v. Mayer,* 196 N. C., 454, 146 S. E., 64. The facts in that case are almost identical with those in the instant case. Under the provisions of the statute (C. S., 4643) the reversal of the judgment has the force and effect of a verdict of "not guilty." The defendant is therefore, discharged.

Reversed.

T. JULIAN WARREN v. STATE OF NORTH CAROLINA.

(Filed 2 July, 1930.)

State E b—Supreme Court will not pass upon a claim against the State when no question of law is involved therein.

A claimant against the State is not entitled to the recommendatory jurisdiction of the Supreme Court upon petition presented to it under the provisions of Const., Art. IV, sec. 9, when no question of law is presented by the facts alleged in the petition.

THIS is a proceeding to enforce a claim against the State of North Carolina for services rendered by claimant to the State Board of Elections, under a contract alleged to have been made with claimant by the assistant secretary of said board. Constitution of North Carolina, sec. 9, Art. IV, C. S., 1410.

The proceeding was duly heard upon the pleadings, consisting of the petition filed by the claimant and the answer filed by the Governor of the State. It appearing from said pleadings that claimant is not entitled to a decision by this Court, in the exercise of its jurisdiction with respect to claims against the State, the proceeding was dismissed.

T. Julian Warren for claimant.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for the State.

CONNOR, J. For the purpose of disposing of this proceeding, begun in this Court (Const. of N. C., sec. 9, Art. IV), it may be conceded that the facts are as alleged in the petition, to wit: (1) That claimant performed services for the State Board of Elections, as alleged in the petition; (2) that said services were performed pursuant to a contract of employment made with claimant by the Assistant Secretary of said Board; (3) that said Assistant Secretary had authority to make said contract; and (4) that claimant has not been paid the compensation for said services agreed upon by said contract.

Upon these facts, however, no question of law is presented, the decision of which by this Court would aid the General Assembly in determining whether or not an appropriation should be made for the payment of the claim. For this reason in accordance with authoritative decisions of this Court with respect to its jurisdiction in proceedings for the enforcement of claims against the State, the proceeding was dismissed. *Lacy v. State,* 195 N. C., 284, 141 S. E., 886, and cases cited and reviewed in the opinion of the Court. Where the facts upon which a claim against the State is founded, are in controversy and no question of law is involved, this Court will not, in the exercise of its jurisdiction, conferred by the Constitution of the State, with respect to claims against the State, pass upon the validity of the claim, with a view to recommending payment or rejection of the claim by the General Assembly. In such case, the claimant is not entitled to the aid of this Court in presenting his claim to the General Assembly, nor should he be prejudiced by an adverse decision.

Dismissed.

CARL V. REYNOLDS v. CITY OF ASHEVILLE, et al.

(Filed 2 July, 1930.)

1. **Taxation E b—Validity of assessment of tax may be tested by injunction.**

   The legality of a tax assessed by a city may be tested in proceedings in injunction.

2. **Municipal Corporations K d—Where property is annexed by city after attachment of tax liens, city may not tax such property for fiscal year.**

   The lien for taxation attaches annually to realty prior to the thirtieth of June under the general law in effect in 1929, and where the boundaries of a city are extended under an act providing that the date of the annexation be deferred until the thirtieth of June, 1929, the property so annexed is not within the city on the date that the lien for taxation attaches, and such property is not subject to an *ad valorem* tax levied by the city for the year of 1929.

Clarkson, J., dissenting.

Appeal by defendants from *Sink, Special Judge,* at April Term, 1930, of Buncombe.

Civil action to restrain the collection of an alleged unlawful tax and to declare the lien, sought to be asserted against plaintiff's property, void.

There being no dispute as to the facts upon which the controversy depends, a jury trial was waived and the matter submitted to the court, on the facts agreed, which, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

1. Chapter 205, Private Laws 1929, provides that, subject to an election to be held on 30 April, 1929, which was held and carried, the boundaries of the city of Asheville are to be extended so as to include additional territory, some incorporated and some not.

2. By the terms of said act, the date of annexation was deferred until 30 June following.

3. Prior to and at all times during the year 1929, the plaintiff owned real and personal property located in that part of the town of Biltmore Forest which was included within the new boundaries of the city of Asheville as set forth in the Extension Act above mentioned.

4. On 1 May, 1929, the plaintiff duly listed his property for taxation by the county of Buncombe and the town of Biltmore Forest, and has paid to the county and to the town of Biltmore Forest all the taxes levied and assessed against his property for the year 1929.

5. As soon as available, all tax lists of Buncombe County which relate to property and polls within the city of Asheville, are furnished to the city as its own tax lists.

6. On 8 October, 1929, the board of commissioners of the city of Asheville duly passed a tax ordinance, and endorsed the tax lists, prepared in conformity with said ordinance, so as to affect all property within the city, including that annexed under the Extension Act aforesaid.

The plaintiff contends that as his property was not within the corporate limits of the city of Asheville on 1 May, 1929, when the situs of taxable property was fixed by law for the ensuing tax year, and did not come within such limits until 30 June thereafter, the city was without power on 8 October, 1929, in the absence of special legislative authority, to levy a valid *ad valorem* tax on his property prior to the tax year 1930.

The plaintiff's position was upheld in the court below, and from a judgment enjoining the defendants from collecting the tax in question and declaring the same invalid, the defendants appeal.

Alfred S. Barnard for plaintiff.

George Pennell, Charles Earl Jones and Charles N. Malone for defendants.

STACY, C. J. The appropriateness of the proceeding, to test by injunction the validity of the alleged illegal tax, is asserted in *R. R. v. Commissioners,* 188 N. C., 265, 124 S. E., 560.

There was some confusion in the law as it existed in 1929 as to whether the lien of State, county and municipal taxes attached annually on the first day of May, the date of listing, or on the first day of June. C. S., 2815 and 7987; *Chemical Co. v. Brock,* 198 N. C., 342; *Shaffner v. Lipinsky,* 194 N. C., 1, 138 S. E., 418; *Carstarphen v. Plymouth,* 186 N. C., 90, 118 S. E., 905. But however this may have been, it certainly attached annually under the general law, as then written, prior to 30 June, and we find nothing in the local statutes to take the present case out of the general class. Hence, it would seem that as plaintiff's property was not within the corporate limits of the city of Asheville on 1 May or 1 June, 1929, it was not subject to an *ad valorem* tax levied by said municipality for the fiscal year 1929. *Shaffner v. Lipinsky, supra.*

The decision in *Harrington v. Comrs.,* 189 N. C., 572, 127 S. E., 577, strongly relied upon by the defendants, is not at variance with this position, for the *Harrington case* was controlled by other statutes and other laws.

It appears that at least six courts have considered similar questions, arising under slightly different laws and different fact situations, two upholding such taxes (*Johnston v. Huntington,* 71 W. Va., 106, 76 S. E., 142; *City of Westport v. McGhee,* 28 Mo., 152, 30 S. W., 523), and four deciding against their validity (*Detroit Trust Co. v. Detroit,* 248 Mich., 612, 227 N. W., 715; *City of Gulfport v. Todd,* 92 Miss., 428, 46 So., 541; *Chattanooga v. Raulston,* 117 Tenn., 569, 97 S. E., 456; *Austin v. Butler,* 40 S. W. (Tex. Civ. App), 340).

The rationale of our own decisions would seem to point in the direction of the majority. *Wachovia Bank & Trust Co. v. Nash County,* 196 N. C., 704, 146 S. E., 861. Had the plaintiff been a nonresident of the State prior to 1 May, 1929, and on 30 June thereafter moved to Asheville, bringing property with him, the State would not have taxed the property, thus initially brought within its borders, for the year 1929, and it is not to be supposed, in the absence of specific legislative authority, that a municipality may do what the State itself does not do. *City of Gulfport v. Todd, supra.*

The Legislature, of course, may confer power on a municipality to fix its tax year at dates different from those fixed by the general law, but that is not the question here presented. *Chattanooga v. Raulston, supra.* We are construing the pertinent local and general statutes as they were written in 1929. The correct judgment was entered in the court below.

Affirmed.

CLARKSON, J., dissenting: The question involved in this appeal: Did chapter 205, Private Laws of 1929, entitled "An act to Extend the Corporate Limits of the City of Asheville," ratified 18 March, 1929, authorize the city of Asheville, after the approval of city extension by the voters in said city and annexed territory, on 30 April, 1929, to pass an *ad valorem* tax ordinance for its fiscal year beginning 1 September, 1929, on taxable property situated 1 May, 1929, in territory annexed to the city of Asheville? I think so.

Under section 3 of the act it was mandatory that the election be held on Tuesday, 30 April, 1929, and the act went into effect from and after its ratification 18 March, 1929. The election was held in accordance with the act and a majority of votes cast was "For City Extension" and "Greater Asheville" was born.

Part of section 5, is as follows: "If at such election a majority of the votes cast shall be 'For City Extension,' then, from and after the thirtieth day of June, one thousand nine hundred and twenty-nine, the corporate limits of the said city of Asheville shall be extended as herein provided, and the territory described above shall be a part of the corporate territory of the city of Asheville, and such territory, its citizens and property, shall be subject to the charter and all laws, ordinances and regulations in force in said city."

Section 7, in part: "That if the corporate limits of the city of Asheville are extended as herein provided, the city of Asheville shall assume all the valid and subsisting outstanding bonded indebtedness and other liabilities incurred for necessary expenses of the incorporated towns of Kenilworth, Biltmore, South Biltmore, and the city of Asheville shall succeed to all the assets, revenues, taxes, assessments, real and personal properties of said municipal corporations," etc.

Section 8, in part: "That if the corporate limits of the city of Asheville shall be extended by said election as hereinbefore provided, then the city of Asheville shall assume all of the bonded debt of the Woolsey Sanitary Sewer District," etc.

Section 10, in part: "That if the corporate limits of the city of Asheville shall be extended by said election as herein provided, then it shall be the duty of the city of Asheville after the date of said election and before the thirtieth day of June, one thousand nine hundred and twenty-nine, to surrender the control of the present city of Asheville Special Charter School District and shall surrender the same to the board of education of Buncombe County," etc.

The plaintiff contends: That section 5 of the Greater Asheville Act extended the Asheville city limits so as to include his property only from and after 30 June, 1929, and consequently, since his property was not within the corporate limits of Greater Asheville on 1 May, 1929, the day after the election established city extension, the taxable situs of his property was within the town of Biltmore Forest and not in Greater Asheville, although the Greater Asheville boundary is described by course and distance in section 1 of Greater Asheville Act, so as to include both old Asheville and all annexed territory, including that portion of the town of Biltmore Forest in which plaintiff's property was located on 30 April, 1929. Plaintiff furthermore contends that the relation of debtor and creditor between him and the town of Biltmore Forest was fixed by the taxable situs of his property on 1 May, 1929, and that it could not thereafter be changed by the Greater Asheville Act which included his property within the city of Asheville on 1 July, 1929. Plaintiff also contends that the taxable situs of his property was in the town of Biltmore Forest on 1 June, 1929, the date fixed by law when the tax lien attaches, and that unless his property was within the city of Asheville on 1 June, 1929, which he denies, the city of Asheville could not by its ordinance passed 8 October, 1929, levying an *ad valorem* tax on plaintiff's property fasten a tax lien upon it as of 1 June, 1929.

The defendant contends: That on 30 April, 1929, the only condition prefixed to the annexation of territory under the Greater Asheville Act was removed by an election at which a majority of the voters voted "For City Extension" and that *eo instanti* this condition was removed, the provisions of the Greater Asheville Act became effective. Section 5 of Greater Asheville Act and the provisions therein which extends the corporate limits of the city of Asheville from and after 30 June, 1929, contemplates that the administration of annexed territory for municipal purposes by the city of Asheville was set to begin on 1 July, 1929, and that on 30 June, 1929, the administration of such territory by the town of Biltmore Forest, the towns of Kenilworth, Biltmore and South Biltmore and by the Sanitary District of Woolsey and the other water and sewer districts should terminate. This provision relates exclusively to a transfer of municipal administration from the former towns and districts to the city of Asheville and it fixes a date when that transfer shall be accomplished.

By section 7 the language is clear that on 30 April, when Greater Asheville was born, it had to assume all the indebtedness of the town taken in and the city of Asheville *"shall succeed to all the assets, revenues, taxes, assessments, real and personal properties of said municipal corporations,"* not from 1 July, 1929, as contended for by plaintiff but from the date of 30 April, 1929, when by vote the territory became Greater Asheville.

Nothing is said in section 5, as to assets, revenues, taxes, assessments, etc., but it says in regard to the corporate limits of Greater Asheville, *"such territory its citizens and property, shall be subject to the charter and all laws, ordinances and regulations in force in said city,"* and this shall be from 1 July, 1929. The two sections are reconcilable. Section 5, relates to the police administration of Greater Asheville and the transfer of municipal administration of these former towns and districts into Greater Asheville, and until 1 July, 1929, is given to take over this burden. Section 7 says in plain words when the corporate limits are extended, as herein provided, that is, when the vote was taken 30 April, Greater Asheville shall assume all the burdens of these towns, etc., and so instantly as the burdens are assumed by Greater Asheville, the benefits are given to Greater Asheville "shall succeed to all *the assets, revenues, taxes, assessments, real and personal property of said municipal corporation.*"

It was never intended by the act, and there is no language that so says, that the tax period shall begin 1 July, 1929, but, on the contrary, the reasonable construction is that the tax period shall begin from 30 April, 1929, and the Greater Asheville *shall succeed to all the assets, revenues, taxes,* etc.

The position here taken is consonant with reason and justice. Construing the intent of the General Assembly, it would hardly be supposed that the General Assembly would entail on *old Asheville* $700,000 of extra taxes and assume the burdens of the new territory Greater Asheville, and relieve the new territory from taxes at the same time the new territory gets its indebtedness assumed and interest paid on bonds, fire and police protection, sanitary service, water, lights and other conveniences furnished by *old Asheville.*

The different sections of the act are reconcilable, and it is an unreasonable construction that would put such a burden on old Asheville. Plaintiff's property, as before shown, was in Greater Asheville on 1 May, 1929, when the situs of taxable property was fixed by law for the ensuing year. Plaintiff's property was on 1 May, 1929, in Greater Asheville, his property was subject to tax from that date. His property is receiving the benefits and should bear the burden of taxation.

W. B. NIXON v. CITY OF ASHEVILLE.

(Filed 2 July, 1930.)

(See *Reynolds v. Asheville, ante,* 212, and *Penland v. Bryson City, ante,* 140.)

APPEAL by plaintiff from *MacRae, Special Judge,* at April Term, 1930, of BUNCOMBE.

Controversy without action submitted on an agreed statement of facts.

Judgment for defendant, from which the plaintiff appeals.

R. M. Wells for plaintiff.

George Pennell, Charles N. Malone and Charles E. Jones for defendants.

STACY, C. J. This is a companion case, with a contrary decision in the court below, to *Reynolds v. Asheville, ante,* 212, and is controlled by what was said in that case, the fact situations in the two cases being sufficiently similar to present no question of legal difference. Primarily, both cases involve the same principles of law.

There is this additional question: Plaintiff seeks to challenge the validity of the City Extension Act as not having been passed by the Legislature in the manner provided by Article II, section 14, of the State Constitution. That such is not necessary was decided in *Lutterloh v. Fayetteville,* 149 N. C., 65, 62 S. E., 758, and *Penland v. Bryson City, ante,* 140. But relieving the plaintiff of the tax would seem to take from him the right to insist on a determination of the constitutionality of the act.

Error.

CLARKSON, J., dissents.

EDWARD P. GILKEY v. CITY OF ASHEVILLE ET AL.

(Filed 2 July, 1930.)

(See *Reynolds v. Asheville, ante,* 212.)

APPEAL by defendants from *Sink, Special Judge,* at April Term, 1930, of BUNCOMBE.

Civil action to restrain the collection of an alleged illegal tax.

Judgment for plaintiff, from which the defendants appeal.

Alfred S. Barnard for plaintiff.

George Pennell, Charles N. Malone and Charles E. Jones for defendants.

STACY, C. J. This is a companion case to *Reynolds v. Asheville, ante,* 212, and is controlled by what was said in that case, the similarity of the fact situations in the two cases being such as to call for no distinguishment or further discussion. The legal questions involved are the same.

We are not unmindful of the apparent equity of appellants' position, considering the burdens assumed and benefits conferred by the extension of the city limits, but this is a matter which the Legislature is presumed to have considered, and the law is as it is written.

Affirmed.

CLARKSON, J., dissents.

W. S. McDONALD, ADMINISTRATOR OF THE ESTATE OF FRANCES McDONALD, DECEASED; W. S. McDONALD, MAX McDONALD AND VIOLA HADLEY, HEIRS AND NEXT OF KIN OF FRANCES McDONALD, v. D. C. LINGLE, INDIVIDUALLY AND AS TRUSTEE; J. A. LINGLE, INDIVIDUALLY AND AS TRUSTEE; AND ODELL LINGLE.

(Filed 2 July, 1930.)

1. **Appeal and Error J c—Findings of fact supported by evidence are conclusive on appeal.**

The referee in passing upon the evidence of the value of certain property is not bound by the estimates of witnesses as to its value, but is at liberty to consider the situation of the property, its description and condition, and where evidence so considered supports his findings and the trial judge confirms them they are not reviewable on appeal.

2. **References C c—In absence of evidence impeaching allowance of attorney's fees by referee, confirmation by court will not be disturbed.**

Where an action to set aside certain mortgages is referred to a referee, and the referee allows the payment of a prior mortgage lien securing an amount due for legal services rendered the mortgagor out of the proceeds of the foreclosure sale, and the trial court confirms the allowance, in the absence of allegation and evidence tending to impeach the transaction, the action of the trial court will not be disturbed on appeal.

3. **Mortgages B a—Where mortgagee in possession is negligent in collecting rents he is liable to mortgagor for reasonable rental value.**

A mortgagee or trustee in possession of the mortgaged premises under an agreement to collect the rents and apply them to the mortgage debt is chargeable with the reasonable rental value of the property while in his possession if he is negligent in collecting the rents and managing the property.

APPEAL by plaintiffs and defendants from *Stack, J.*, at October Term, 1929, of ROWAN. Affirmed on both appeals.

This action was consolidated with another entitled W. S. McDonald *et al. v.* D. C. Lingle, trustee.

The plaintiffs, as heirs at law and next of kin of Frances McDonald, brought suit to set aside certain mortgages and deeds of trust alleged to have been executed by Frances McDonald through the fraudulent contrivance of the defendants. They alleged that Frances was of unsound mind, that between her and one of the defendants there was a fiduciary relation, and that she was deceived and induced to execute the assailed conveyances. By consent the cause was referred to D. A. Rendleman. He made a report containing his findings of fact, among which are the following:

The mind of Frances McDonald began to fail about ten years prior to her death and became gradually weaker until 8 July, 1926, when she was adjudicated a lunatic by the Superior Court of Rowan County and committed to the State Hospital for the Insane at Goldsboro. During the years 1924, 1925, and 1926 she was of unsound mind and incapable of making or understanding a contract.

At the time of her death she was seized of three lots in the city of Salisbury referred to as A, B, and C.

In March, 1925, she and D. C. Lingle entered into an agreement under which Lingle constructed for her three four-room houses on lot A, for which she executed a note for $4,650 and secured it by a deed of trust conveying to J. A. Lingle, trustee, lot A and the three houses thereon. The reasonable cost and value of the houses was $900 each, or $2,700. Frances held possession of the houses until 1 January, 1926, when D. C. Lingle took possession under an agreement to collect rents therefrom and apply them on the note and mortgage for $4,650. He kept no personal record of the rents collected but accounted for rents in the amount of $1,212.50 from 1 January, 1926, to 15 August, 1929, by a statement prepared from rent books and receipts issued to tenants during this period. Only three receipt books were introduced out of a large number issued. More than 50 per cent of rent was lost by reason of vacancies and uncollected accounts. D. C. Lingle was negligent in failing to keep a record of the rents collected and allowing a loss by reason of vacancies and lost accounts.

The reasonable rental value of the houses during 1926, 1927, and 1928 was $16.00 a month each and for 1929 $12.00 a month each. A loss of one month a year is usual in rentals of this character and a loss of a month or five weeks a year should cover all rents lost, if reasonable diligence is observed.

While in possession of the houses D. C. Lingle paid necessary expenses and accounts amounting to $598.71.

Pursuant to the terms of said $4,650 deed of trust, on 27 April, 1929, John A. Lingle, trustee, sold the lands described therein, at which sale Odell Lingle became the last and highest bidder for the same at the price of $3,750; that no advanced or upset bid was placed on said property within ten days.

On or about 14 July, 1928, Odell Lingle loaned $150.00 in cash to Frances McDonald, which was received and used by Frances McDonald in the payment of necessary outstanding bills and accounts; that as a part of the same transaction, Odell Lingle sold to the said Frances McDonald one four-cylinder Buick automobile for the sum of $250.00; that said automobile was reasonably worth $250.00, but that Frances McDonald had no use for the same, was unable to use or benefit by said car and that her estate was not benefited by the same; that on 14 July, 1925, Frances McDonald executed a note in the sum of $400.00 to Odell Lingle, and to secure the same executed and delivered to D. C. Lingle, trustee, a mortgage deed of trust covering tract B heretofore described, which mortgage trust deed is registered in Book of Mortgages No. 94, page 100, in the office of the register of deeds for Rowan County, the consideration for said note and mortgage being said loan of $150.00 and said Buick automobile.

At the time the note and mortgage for $400 were executed there were five outstanding registered liens upon the property covered by the mortgage, including a mortgage to A. A. F. Seawell and to J. M. Waggoner for legal services in contested suits involving the property of Frances McDonald.

On 10 August, 1928, after due advertisement, D. C. Lingle, trustee, pursuant to the powers contained in said $400.00 deed of trust, sold tract B to John A. Lingle for the purchase price of $1,155; that from the proceeds of such sale all prior liens, aggregating $1,237.19, and costs of sale, $71.29, total $1,308.48, were paid by the said trustee or assumed by the purchaser; that said prior mortgages have been canceled and so presented in court; that the actual value of lot B was not more than $1,308.48, and that there was no payment on said $400.00 note from the proceeds of sale thereof.

During the foregoing transactions Frances McDonald constantly sought and relied on the assistance and advice of D. C. Lingle in all business transactions. Odell Lingle and J. A. Lingle are his sons, and Eltha Lingle is his daughter.

The referee filed a supplemental report in which he stated $1,990.55 to be due D. C. Lingle; $188.08 to be due Odell Lingle; and the net amount to be due the estate of Frances McDonald from the sale to Odell Lingle, on 7 October, 1929, to be $1,571.37.

His conclusions of law are as follows:

1. The note executed by Frances McDonald to D. C. Lingle, dated 31 March, 1925, secured by mortgage deed of trust to J. A. Lingle, trustee, recorded in Book of Mortgages No. 92, p. 182, is voidable and should be set aside.

2. The estate of Frances McDonald is due D. C. Lingle the reasonable value of said houses, $2,700, with interest from 15 May, 1925, subject to credits hereinafter shown, this amount to be paid to D. C. Lingle from the proceeds of sale to Odell Lingle set forth in paragraph 9 of these findings of fact. Hereto attached, marked Exhibit A, is a statement of the balance due D. C. Lingle, showing all charges and credits in detail.

3. D. C. Lingle, mortgagee in possession of said three houses from 1 January, 1926, to 1 September, 1929, should be charged with the reasonable rental value of the same during said period, without compensation for services rendered, and credited with reasonable and necessary disbursements incident to holding and preserving said property.

4. The estate of Frances McDonald is due Odell Lingle $150.00 by reason of the loan set forth in paragraph 10 of these findings of fact, with interest on $150.00 from 14 July, 1925.

The plaintiffs and the defendants filed exceptions, all of which were overruled. Judge Stack approved and confirmed the report, and adjudged:

2. That defendants' demand for a jury trial be overruled and disallowed, it appearing that the reference was by consent of all parties.

3. That the sale by J. A. Lingle, trustee for D. C. Lingle, of the three houses and lots on Railroad Avenue to Odell Lingle for the sum of $3,750 be hereby approved and confirmed, and said purchaser is hereby ordered and directed immediately to pay said sum to said trustee, and upon said payment said trustee shall convey said property to said purchaser.

4. That J. A. Lingle, trustee for D. C. Lingle, pay and disburse said sum as follows: He shall pay the sum of $1,990.55 to D. C. Lingle; he shall pay Odell Lingle the sum of $188.08; and he shall pay to W. S. McDonald, Max McDonald, and Viola Hadley, the heirs of Frances McDonald, the balance of $1,571.37.

5. That the plaintiffs, W. S. McDonald, Max McDonald, and Viola Hadley have and recover judgment for said last mentioned sum against the prosecution bond heretofore filed by defendants in this action, that is to say that they have and recover of D. C. Lingle, J. A. Lingle, and Odell Lingle, as principals, and M. A. Goodman, and Mrs. M. A. Goodman, as sureties, the sum of $2,500 to be discharged upon payment to said plaintiffs of the aforesaid sum of $1,571.37, together with interest thereon from 7 October, 1929, until paid.

6. That defendants shall pay the costs of these actions to be taxed by the clerk, including $75.00, which is hereby allowed to D. A. Rendleman for his services as referee therein, and $137.00, which is hereby allowed to Freda Gardner for her services as stenographer, therein.

The plaintiff will (pay) one-half of the referee's fee, to wit, $75.00. The stenographer allowed $137.00.

The plaintiffs and the defendants excepted to the judgment and appealed.

Lee Overman Gregory for plaintiffs.
J. M. Waggoner for defendants.

Plaintiffs' Appeal.

Adams, J. The plaintiffs' first assignment of error is the finding that the actual value of lot B was not more than $1,308.48. The referee's finding of the value, approved by the judge, has support in the evidence. Neither the referee nor the judge was bound by any of the estimates of the witnesses but each was at liberty to consider, not only statements or opinions of the value, but the situation, description, and condition of the property. As there was evidence in support of the finding we discover no just cause for modifying the judgment by setting aside the finding.

With respect to the second assignment it may be said that the fees paid the attorneys were presumably for the protection or benefit of the estate of Frances McDonald; and in the absence of specific allegation and proof tending to impeach the transactions we must decline to reverse the finding of the presiding judge in reference thereto. On the plaintiffs' appeal the judgment is

Affirmed.

Defendants' Appeal.

Adams, J. The exceptions taken by the defendants raise the questions (1) whether there is sufficient evidence that Frances McDonald was of unsound mind on 31 March, 1925, and (2) if so whether the defendants had knowledge of her mental incapacity; also (3) whether there is sufficient evidence that D. C. Lingle was her confidential adviser at that time; (4) whether he dealt unfairly with her; (5) whether he should be charged with the reasonable rental value of the houses instead of the rent actually collected; and (6) whether the judge committed error in signing the judgment. The counsel representing the defendants realizes that if on these questions the evidence is adequate, this Court is bound by the judge's findings of fact. It is apparent, therefore, that no doubtful or disputed question of law is involved.

The evidence in our opinion is sufficient to sustain all the facts found by the referee and approved by the Superior Court. It would be useless to set out a minute review of the testimony or to contrast the various opinions expressed concerning the several questions. Upon the finding that Lingle was negligent in collecting the rents it must be held that he is chargeable with the reasonable rental value of the property. On defendants' appeal the judgment is

Affirmed.

J. N. CRAWFORD v. MICHAEL & BIVENS, INC., AND R. B. KEPHART, TRADING AS NEW WAY LAUNDRY.

(Filed 2 July, 1930.)

1. **Master and Servant C b—Employer's duty to provide safe place to work does not apply where employer does not have control of premises.**

   The rule requiring an employer to exercise reasonable care to provide his employee a reasonably safe place to work does not apply where the employer does not have charge of or control over the premises and has no express or implied notice of the existence of unsafe conditions there, and where an employee is sent to the premises of a customer to repair an electrical switch-box it is the duty of the employee to inform the employer of any unsafe conditions or of the necessity of a helper to do the work when the work to be done is simple and it could not have been reasonably anticipated that such necessity would exist.

2. **Same—In this case held: evidence did not show that injury resulted from any negligence of employer and nonsuit was proper.**

   Where the evidence discloses that the employer ordered his employee to go upon the premises of a customer and repair an electrical switch-box, and that the premises were not under the control of the employer, and that the work to be done was simple, and that the employee did not inform his employer of any unsafe conditions there or of the necessity of a helper, although he could have easily done so by telephone: *Held,* the evidence fails to disclose any breach by the employer of his duty to exercise reasonable care to provide his employee a reasonably safe place to work and sufficient help for its performance, and defendant's motion as of nonsuit should have been granted.

3. **Master and Servant C d—In this case held: evidence failed to show breach of duty to warn or instruct employee of danger.**

   Where an electrical contractor sends his employee to the premises of a customer to repair a switch-box, and the evidence tends to show that the employer warned and instructed the employee to cut off the electricity while working thereon, which the employee knew to be the safe method of doing the work from previous experience: *Held,* the employer having warned the employee of the only danger which the employer could have reasonably apprehended the employee would be exposed to, the evidence fails to show any breach of the employer's duty to warn and instruct his employee of the dangers incident to the work.

4. **Master and Servant C c—In this case held: evidence fails to show negligence of employer in ordering employee to repair switch box.**

Where all the evidence tends to show that an employee ordered to repair an electrical switch-box had had over two years experience as a worker on electrical apparatus, and that he readily undertook to do the work ordered: *Held*, the evidence fails to show any negligence of the employer in ordering the employee to repair the switch, and the employee cannot successfully maintain that he was inexperienced and incompetent to do such work, and upon failure of the evidence to show any negligence on the part of the employer his motion as of nonsuit should have been allowed.

APPEAL by defendant, Michael & Bivens, Inc., from *Harding, J.*, at December Term, 1929, of GASTON. Reversed.

This is an action to recover damages for personal injuries sustained by plaintiff while at work as an employee of the defendant, Michael & Bivens, Inc., temporarily on the premises of the defendant, R. B. Kephart, trading as New Way Laundry, in the performance of a contract between his employer and the said New Way Laundry.

At the close of the evidence for the plaintiff, the action against the defendant, R. B. Kephart, trading as New Way Laundry, on motion of said defendant, was dismissed by judgment as of nonsuit. C. S., 567.

The issues thereafter submitted to the jury were answered as follows:

"1. Was the plaintiff injured by the negligence of the defendant, Michael & Bivens, Inc., as alleged in the complaint? Answer: Yes.

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,300."

From judgment on the verdict that plaintiff recover of the defendant, Michael & Bivens, Inc., the sum of $1,300, and the costs of the action, the said defendant appealed to the Supreme Court.

R. G. Cherry and A. C. Jones for plaintiff.
P. W. Garland for defendant.

CONNOR, J. The defendant, Michael & Bivens, Inc., is a corporation organized and doing business under the laws of the State of North Carolina. It is engaged in the general electrical business in the city of Gastonia; it sells, installs and repairs electrical apparatus and fixtures. It makes repairs on electrical apparatus and fixtures, either at its plant, or on the premises of its customers.

On 11 June, 1927, the said defendant instructed the plaintiff, one of its employees, to go to the New Way Laundry, in the city of Gastonia, and to make certain repairs to the electrical apparatus used by the owner and operator of said laundry, in the operation of his business. Pursuant to these instructions, plaintiff went to said New Way Laundry, and while engaged in making said repairs, in accordance with said instructions, he was injured. This action was begun by plaintiff to recover of the defendant, Michael & Bivens, Inc., and of the defendant, R. B. Kephart, trading as New Way Laundry, the sum of $5,000 as damages resulting from said injuries.

In his complaint, after alleging specifically facts and circumstances with respect to the conditions under which he was at work, at the time he was injured, plaintiff alleges, generally, that his injuries were caused directly and proximately by the carelessness and negligence of the defendants in that:

"(a) The defendants carelessly and negligently failed to provide the plaintiff with a reasonably safe place in which to do and perform his work, as aforesaid.

(b) That the premises upon which and in which the plaintiff was required to work were dangerous and unsafe, and the defendants had knowledge of, or could and should have known of the dangerous condition of the same, and the defendants carelessly and negligently permitted the same to exist and remain unsafe and dangerous while the plaintiff performed his work, as aforesaid.

(c) That the defendants carelessly and negligently permitted and allowed excessive heat to be in the said pipes, in close proximity to the place where this plaintiff was required to do and perform his work, as aforesaid.

(d) That the defendants carelessly and negligently permitted and allowed the floor on and upon which it was necessary for the plaintiff to do and perform his work, to become unsafe and dangerous, slimy, slick and slippery.

(e) That the defendants carelessly and negligently and without warning to this plaintiff caused to be electrified the wires and apparatus near and at which the plaintiff was doing and performing his work by connecting and cutting on the electric current, as aforesaid.

(f) That the defendants well knew that this plaintiff was inexperienced in the character of work which he was doing, and that plaintiff was ignorant of the danger of the same, and the defendants knew, or could or should have known the danger of the work which he was doing, and failed, in their superior skill, knowledge, and foresight, to instruct and protect the plaintiff."

Both defendants in the answers filed by them, respectively, denied all allegations of the complaint upon which plaintiff contends that they are liable to him in this action; each of the defendants, in further defense, alleges in said answer that plaintiff by his own negligence, as specifically alleged therein, contributed to his injuries, and that he is therefore barred of any recovery of the defendants in this action.

At the trial, plaintiff as a witness in his own behalf, testified as follows:

"I am the plaintiff in this action. I live in Gastonia and am now 28 years of age. On 11 June, 1927, I was employed by defendant, Michael & Bivens, Inc. I had been doing electrical work for them for over two years. I was a helper. I knew nothing about the electrical business before I was employed by Michael & Bivens, Inc. I had no knowledge of the business at the time I was injured except what I had picked up while working for them as a helper. I was preparing myself to be a 'trouble shooter.' I worked as a helper, and was trying to learn to 'shoot trouble.'

"I was injured on 11 June, 1927, while at work in the New Way Laundry, in the city of Gastonia. This laundry is owned by the defendant, R. B. Kephart. It was not under the control of the defendant, Michael & Bivens, Inc. I was sent there by Mr. Bryant, shop superintendent of Michael & Bivens, Inc. He gave me orders to go there at 2 o'clock, Saturday afternoon and replace some contacts which had been damaged. He said the power would be off at 2 o'clock, I think. I was to take off the burned contacts, and replace them with new ones.

"When I got to the New Way Laundry, I saw Mr. Robinson, the manager of the plant. I told him that I had come from Michael & Bivens to repair the switch. I asked him if the power was off. He said 'No.' I then asked him if he would cut the power off. He said 'Yes.' After I got the power cut off, I went and pulled the fuses out of the fuse box and started to work on the contacts in the starter box. The starter box was on the wall. There were pipes beneath the starter box—so close to the wall that I burned my hand on the pipes. I saw that I would have to take the starter box off the wall. I went to Mr. Robinson and asked him for a man to help me do this. He gave me a man—an employee of the laundry. We went to work, taking the starter box down from the wall. It was attached to the wall by four bolts, which went clear through the wall. My helper went on the outside of the building. He was holding the bolts with a wrench, while I was unscrewing them on the inside with a wrench. I was taking the bolts out with one hand, and holding the box with my other hand. After I had got two of the bolts loose, and while I was taking out the third, I suddenly became unconscious. I do not know what happened after that. When I regained consciousness, I was in the hospital. I was burned in several places on my body. I remained in the hospital about six weeks. It was about two months after I returned home before I was able to go back to work.

"After Mr. Robinson had cut off the power, and I had started to work, he came to me and said he wanted to run some of his machines, and would like to cut the power on for that purpose. I told him that that would be all right, I had the fuses out. The wires ran from the fuse box to the switch box. When the fuses are taken out of the fuse box, this cuts off the electricity from lines running from the fuse box down to the switch box. The current coming in had to flow through those fuses to get to the switch box. Taking out the fuses cut off the supply of electricity to the place where I was working on the switch box. When I told Mr. Robinson that I thought it would be all right for him to cut the power on, I was not working at the fuse box. I believed it would be safe if he cut on the power, after I had pulled the fuses from the fuse box, and while I was working on the switch box.

"The starter box in the New Way Laundry was on the wall—just over some pipes. The bottom of the box was about 2½ feet from the floor. The box itself was about 18 inches high, about 12 or 14 inches wide, and about the same in depth. With its contents the box weighed about 100 pounds. Beneath the starter box, were some iron pipes, which were hot. They would burn you, if you touched them. The fuse box was on the wall, above the starter box. It holds the fuses. It was about a foot square, and made of iron. There were 3 fuses in it.

"The floor underneath the starter box was concrete. There was a slick substance on the floor which made the place where I had to stand while at work very slick. I did not notice whether the floor slanted or not.

"I had not been sent out alone by Michael & Bivens on a job of this character before. No one was sent with me. Before going on the job, I was not warned or instructed or admonished by any one at the plant of Michael & Bivens of the danger which might attend the work or the care that I should take for my protection. I took some contacts, and a few tools with me. The contacts are copper parts that make and break the current. Without them the switch cannot be closed. I had never replaced any contacts in the shop before that time. I do not know what voltage was used in the plant of the New Way Laundry. When I was sent out on this job I was not a competent or experienced 'trouble shooter.' Under normal conditions, it takes two or three years training to make a competent 'trouble shooter.' I had been at work for Michael & Bivens as a helper for two years and three or four months. When Mr. Bryant sent me to the New Way Laundry he told me that he had made arrangements with Mr. Robinson to replace some contacts, and that he wanted me to do the work. I told him all right, and he gave me some contacts which I took with me to the job. He told me that the power would be cut off at 2 o'clock. This was all the conversation I had with him about the job."

There was evidence tending to show that the helper furnished the plaintiff at his request by the New Way Laundry, while at work on the outside of the building, received an electric shock at the time the plaintiff became unconscious. There was also evidence tending to show that some of the burns on the body of the plaintiff were made by electricity, and that other burns were caused by the hot pipes in the laundry, when plaintiff fell on the pipes, after he became unconscious. There was no evidence tending to show that after he got to the New Way Laundry, and saw the conditions under which he would be required to work, plaintiff communicated by phone or otherwise with his employer, Michael & Bivens, and notified him of the conditions at the laundry. All of the evidence tended to show that plaintiff was fully aware of these conditions before he began to work, and while he was at work.

The question as to whether there was evidence at the trial of this action from which the jury could have found that the defendant, R. B. Kephart, trading as New Way Laundry, was liable to plaintiff for the damages resulting from the injuries sustained by him while at work on his premises, is not presented by this appeal. The trial court was of opinion that the evidence offered by the plaintiff was not sufficient to establish liability on the part of said defendant, and therefore sustained his motion, made at the close of the evidence for the plaintiff, that as to him the action be dismissed as of nonsuit. The plaintiff did not except to the judgment dismissing the action as to said defendant, nor appeal therefrom to this Court. The only question, therefore, presented for our decision by this appeal is whether there was error in the refusal of the court to allow the motion of the defendant, Michael & Bivens, Inc., made first at the close of the evidence for the plaintiff, and renewed at the close of all the evidence, that the action be also dismissed as to said defendant.

The defendant, Michael & Bivens, Inc., is not liable to plaintiff in this action, unless his injuries were caused, directly and proximately, by its negligence, as alleged in the complaint. Liability on the part of this defendant cannot be predicated solely upon its relationship as employer to the plaintiff, at the time he was injured. Because of such relationship, however, the law imposed upon said defendant certain duties to be performed by it, the breach of any of which, if the direct and proximate cause of the injuries, was actionable negligence. One of these duties was to exercise due care to provide for the plaintiff a reasonably safe place in which to work. The general rule of the law imposing upon the defendant this duty was not applicable, however, in the instant case, while plaintiff was at work, temporarily, on the premises of the New Way Laundry, for the reason that the place at which plaintiff was required to work was not under the control of said defendant. In *Channon v. Sanford Co.*, 70 Conn., 573, 40 Atl., 462, 41 L. R. A., 200, 66 Am. St. Rep., 133, it is said: "This general rule (imposing liability upon the master for injury resulting from unsafety of the place in which the servant works) is not ordinarily applicable to cases where the master neither has nor assumes possession, use or control, legal or actual, of the premises or place where the servant may be at work. The general rule is based upon such possession, use and control by the master of the premises where he puts his servant at work for him, and speaking generally his duty to use due care to make and keep such place reasonably safe flows from, and is measured by, such possession, use and control. Just as the master's liability for the acts of his servants is based upon his power to control them, so his duty to provide reasonably safe premises is founded essentially upon his occupation, use and control of such premises. This being the reason of the rule, when the reason does not exist, the rule is inapplicable." See, also, *Wilson v. Valley Improvement Co.*, 69 W. Va., 778, 73 S. E., 64, 45 L. R. A. (N. S.), 271, where it is held that a master, having contracted temporarily to perform labor by and through his servants, upon premises owned and fully controlled by another person, and having no knowledge of danger to his servants from defectiveness of the premises, or machinery and appliances of such third person incidentally and casually to be occupied and used by them for the purpose and not having guaranteed the safety or suitableness thereof, is under no duty to inspect the same, nor liable for an injury to his servant, occasioned by defects therein.

"As a general rule the peculiar duties that an employer owes to his employees relate only to premises and instrumentalities over which the employer has complete control and dominion. Otherwise he might be made responsible for the negligence of third persons with reference to premises he had never seen, and about the condition of which he knew, and perhaps, could know nothing." 18 R. C. L., p. 585.

Upon the facts shown by all the evidence in this case, if plaintiff's injuries were caused by the conditions under which he was at work on the premises of the New Way Laundry, this defendant cannot be held liable for the damages resulting from said injuries. There was no evidence from which the jury could have found that this defendant was negligent with respect to the place at, or the conditions under which plaintiff was at work at the time he was injured.

Ordinarily, it is the duty of an employer who orders his employee to work at a place of danger to warn his employee of the danger, and to instruct him how to avoid the danger. In this case, the only danger which the defendant had reason to apprehend plaintiff would be exposed to, while working under its orders, on the premises of the New

Way Laundry, was the presence of the electric power used to operate the machinery in the laundry. Plaintiff was instructed, in effect, not to begin work until this power was cut off. He fully understood the danger, and did not begin work until he was assured by the manager of the laundry that the power had been cut off. Therefore, there was no negligence on the part of the defendant arising from a breach of its duty to warn plaintiff of the only danger which defendant had reason to apprehend.

It is also the duty of an employer to exercise due care to furnish to his employee sufficient help to enable him to do the work required of the employee with reasonable safety. There is no evidence in the instant case tending to show a breach of this duty. The work which the plaintiff was ordered to do was simple. If after he arrived at the laundry, he discovered conditions which made it necessary for him to have help, it was his duty to communicate with his employer, and advise him of such conditions. *Hemphill v. Standard Oil Co.,* 197 N. C., 339, 148 S. E., 443.

Plaintiff testified that at the time he was ordered by defendant to go to the New Way Laundry and to replace the contacts in the starter box, he was not a competent or experienced "trouble shooter." All the evidence shows, however, that he had had over two years experience as a worker on electrical apparatus, in the employment of defendant. His own testimony shows that he readily undertook to do the work required of him, and that he fully understood the apparatus which he was ordered to repair. There was no evidence tending to show that his injuries were caused by the negligence of the defendant, Michael & Bivens, Inc., and for this reason there was error in the refusal of the court to allow the motion of said defendant that the action be dismissed as of nonsuit. The judgment is

Reversed.

MRS. S. T. GRAVES, ADMINISTRATRIX OF S. T. GRAVES, DECEASED, v. MARTHA J. O'CONNOR, EXECUTRIX AND TRUSTEE OF WILLIAM O'CONNOR, DECEASED.

(Filed 2 July, 1930.)

1. Contracts B d—Arbitrariness in refusing to sell is necessary for recovery on contract for payment of sum upon sale of property.

Where in an action upon a contract under the terms of which the grantee of lands agrees to pay to the plaintiff a certain amount per acre for services rendered by the plaintiff in the purchase of the land, the amount to be paid upon the sale of the land by the grantee: *Held,* the contract specifying no time within which the sale was to be made, the doctrine of reasonable time applies, but an issue making the mere lapse of time directing and conclusive upon the question of whether the grantee should have sold the land under the agreement is erroneous, the issue submitted should have been framed in such a way as to enable the jury to find from the evidence whether the grantee arbitrarily or unreasonably refused to sell or whether by the exercise of due diligence he could have sold the land at a fair price.

2. **Trial E c—Instruction which fails to explain the law if the jury finds the facts according to contention of party is error.**

An instruction which fails to explain the law if the facts should be found by the jury as outlined in the contentions of a party is erroneous.

STACY, C. J., and CLARKSON, J., concurring in result.

APPEAL by defendant from *Finley, J.,* at January Term, 1930, of HAYWOOD. New trial.

The plaintiff brought suit to recover a sum alleged to be due by the defendant for services rendered by the plaintiff's intestate on a contract for the sale of land.

On 21 December, 1908, C. H. Rexford and W. A. Rexford signed the following instrument under their seals:

21 December, 1908.

State of North Carolina—County of Buncombe.

Witnesseth: That for services rendered by S. T. Graves to C. H. Rexford and W. A. Rexford in the purchase of about forty thousand (40,000) acres of timber land lying in the counties of Jackson and Transylvania, North Carolina, and Oconee County, South Carolina, and Rabun County, Georgia, C. H. and W. A. Rexford do agree and bind themselves to pay to S. T. Graves 50 cents per acre as his interest, and is due and payable when all or any part of the lands are sold, and they agree not to put any encumbrances on said lands that will in any way affect or impair the value of said Graves' interest without first making a satisfactory arrangement with S. T. Graves regarding his interest. And it is further agreed that they are to refund all monies paid to McDade and L. P. Dendy for option and help in getting up these lands.

C. H. REXFORD. (Seal.)
BY W. A. REXFORD, Attorney in Fact.
W. A. REXFORD. (Seal.)

Witness: M. C. GRESHAM, A. M. JONES."

In 1916 C. H. Rexford and W. A. Rexford conveyed their lands to William O'Connor, the defendant's testator, whether absolutely or only as security not definitely appearing. The plaintiff alleged that upon conveyance of the lands to O'Connor, S. T. Graves, the Rexfords, and

O'Connor entered into an agreement that upon a sale by O'Connor of the lands referred to O'Connor should pay to the plaintiff the debt due him by the Rexfords, namely, fifty cents an acre for 40,000 acres, amounting to $20,000, together with $1,291 advanced by the plaintiff's intestate to McDade and Dendy.

It was in evidence that in 1929 an agreement was made by W. A. Rexford, administrator of C. H. Rexford, deceased, the heirs at law of C. H. Rexford and W. A. Rexford individually, and Martha J. O'Connor individually and as executrix and trustee of William O'Connor and his heirs at law; and that this agreement embraced these facts: (1) $650,000 is the sum expended by William O'Connor and his estate in payments to C. H. Rexford on the lands conveyed to O'Connor by the Rexfords, and in removing liens and perfecting the title, and in paying attorneys' fees and taxes; (2) the Rexfords were given one year from 1 August, 1929, to sell and dispose of the lands, and upon payment by them to the O'Connor estate of $650,000, with interest from 1 August, 1929, and the taxes for 1929, the O'Connor heirs agreed to execute and deliver to the Rexfords or such persons as they should designate a quit-claim deed for all the O'Connor interests in the lands; (3) the Rexfords agreed, in case they failed to make payment as set out above on or before August 1, 1930, to forfeit all the right, title, claim, estate, and interest they have in the lands and to consent that a judgment to this effect be signed by the resident judge of the Eighteenth Judicial District or the judge assigned to hold the courts therein.

The jury returned the following verdict:

1. Did C. H. Rexford and W. A. Rexford agree to pay the plaintiff the sum of fifty cents per acre for services rendered in the purchase of about 40,000 acres of land referred to in the pleadings, upon the sale thereof, together with the sums advanced by the plaintiff by way of option money and other expenses, as alleged in the complaint? Answer: Yes.

2. Did William O'Connor, deceased, for a valuable consideration, agree to assume and carry out the terms of said contract for the payment to the plaintiff of fifty cents per acre for said lands, upon the sale thereof, as alleged in the complaint? Answer: Yes.

3. Did William O'Connor, deceased, for a valuable consideration, agree to assume and carry out the terms of said contract for the payment to the plaintiff of such sums as he advanced to McDade and L. P. Dendy, as alleged in the complaint? Answer: Yes.

4. Have Martha J. O'Connor, executrix and trustee of the estate of William O'Connor, deceased, and the heirs at law of William O'Connor, deceased, sold or contracted to sell said lands, as alleged in the complaint? Answer: Option.

5. Has a reasonable time elapsed within which said lands could and should have been sold, as alleged in the complaint? Answer: Yes.

6. Is plaintiff's cause of action barred by the statute of limitations, as alleged in the answer? Answer: No.

7. Is plaintiff's cause of action barred by the statute of frauds, as alleged in the answer? Answer: No.

8. What amount, if anything, is the plaintiff entitled to recover of the defendant? Answer: $20,831.00.

Judgment for the plaintiff and appeal by the defendant upon assigned error.

Morgan, Ward & Stamey, Alley & Alley and Joseph E. Johnson for plaintiff.

Geo. H. Smathers, W. W. Candler and John M. Queen for defendant.

ADAMS, J. Under the terms of the original contract S. T. Graves, the plaintiff's intestate, was to be paid for his services by C. H. Rexford and W. A. Rexford; but the plaintiff prosecutes this suit against the executrix of William O'Connor on the theory that the Rexfords, S. T. Graves, and William O'Connor mutually agreed that the lands should be conveyed to O'Connor and that he should become liable to the plaintiff's intestate in accordance with the terms of the Rexford contract. The plaintiff alleged and offered evidence tending to show that O'Connor agreed to pay the plaintiff the compensation fixed by the Rexford contract "upon the sale of the lands so conveyed to him by the said C. H. and W. A. Rexford." In the complaint there is an allegation of an implied agreement between the plaintiff and William O'Connor that the latter would endeavor to effect a sale within a reasonable time; but this may be treated as an inference of law rather than an allegation of fact. William O'Connor died in August, 1926, never having made a sale of the property. Nor has it since been sold. It appears from the answer to the fourth issue that the executrix and the heirs of William O'Connor gave an option; but this, we apprehend, refers to the agreement to convey to the Rexfords or their representatives upon payment of $650,000 on or before 1 August, 1930. At any rate, an option is not a sale. The action was commenced 14 November, 1929.

It is in the light of these facts that we must consider the fifth issue and the instruction upon which it was answered by the jury. So considered, the instruction, the issue, and the answer, in our opinion do not embody an accurate statement of the controlling principle. The form of the issue makes the mere lapse of time the directing and conclusive element. S. T. Graves was to be paid for his services upon a sale of all or any part of the lands in question. The contract specified no period within which the sale should be made. It is true that when no time is specified for doing a thing or executing an agreement the doctrine of reasonable time applies. *Michael v. Foil,* 100 N. C., 178, 191; *Winders v. Hill,* 141 N. C., 694, 704. When the act to be done is entirely within the power of the obligor, the party to be charged, the question whether the act is done within a reasonable time is ordinarily a matter of law to be adjudged by the court. *Waddell v. Reddick,* 24 N. C., 424. Instances of this kind fall within the class of cases in which the time taken is so clearly reasonable or unreasonable as to leave no room for doubt. The principle was applied in *Murray v. Smith,* 8 N. C., 41, it appearing that the plaintiff had failed to bring suit within a reasonable time. But there are cases in which the question must be left to the jury. In *Holden v. Royall,* 169 N. C., 676, the Court said that "where the question of reasonable time is a debatable one, it must be referred to the jury for decision," citing *Claus v. Lee,* 140 N. C., 552 and *Blalock v. Clark,* 137 N. C., 140.

In the case before us the question of reasonable time was submitted to the jury; but other elements are involved in the controversy on this point. The sale of the several tracts of land was not dependent exclusively upon the will of William O'Connor. There must have been a buyer. O'Connor may have desired to sell the property and may have made a reasonable effort to do so, but without success. He may have had an opportunity to sell and may have declined to do so, reasonably or arbitrarily. To what extent these factors influenced his conduct is not determined by the verdict. The issue should be framed in such way as to enable the jury to find from the evidence whether William O'Connor arbitrarily or unreasonably refused to sell the lands or whether by the exercise of due diligence he could have made a sale thereof at a fair and reasonable price.

With respect to "reasonable time" his Honor gave the jury this instruction: "While the contract itself says 'when the lands are sold,' yet there are exceptions to that general rule, and that in order to keep it from being a perpetuity, or to prevent the parties from never selling and thereby defeating the plaintiff's claim, the law says a reasonable time, and the court charges you that it seems to be the law and, as far as this case is concerned, is the law, and the question for you to determine is whether or not the plaintiff has satisfied you by the greater weight of the evidence that a reasonable time has elapsed within which said lands could and should have been sold."

If we concede the contention that William O'Connor could have sold the lands, we see in the instruction no rule for guiding the jury in finding under what circumstances he should have made the sale. While he was not required to dispose of his property at a sacrifice, he had no right to defeat the plaintiff's claim by arbitrarily refusing to sell. The question is whether by the exercise of due diligence he could have complied with his contract and have reasonably protected his own interests.

The instruction is defective in one other respect. There is evidence tending to show that William O'Connor became liable on the contract in 1916; but the jury was permitted to consider as against him the time elapsing since 1908. It is true that the recital of the evidence on this point was given as contentions; but it was given as the contentions of the plaintiff. The error consists in a failure to explain the law if the facts should be found by the jury as outlined in the contentions. The jury may have found, according to the instruction, that O'Connor was liable on the contract from the date of its execution by the Rexfords. The defendant is entitled to a

New trial.

STACY, C. J., concurs in the result, but does not assent to the suggestion that the defendants obligated themselves to sell within a reasonable time or to exercise due care to this end, unless the whole contract is to be interpreted as meaning, what it does not express, that such was within the reasonable contemplation of the parties. Plaintiff's intestate was content with the covenant that his interest should become "due and payable when all or any part of the lands are sold," thus placing upon himself, or the plaintiff, the necessity of showing, as a condition precedent to the right of recovery, that the defendants had arbitrarily refused to sell in the face of a reasonable offer, or in some other way had fraudulently sought to defeat the plaintiff's rights. *Ingle v. Green, ante,* 149.

CLARKSON, J., concurs in this opinion.

GEORGE HERBERT REEVES, ALIAS GEORGE WILSON, EMPLOYEE, DECEASED, FRANCES WILSON, F. E. ALLEY, JR., ANCILLARY ADMINISTRATOR AND J. R. GARDNER, ADMINISTRATOR, v. PARKER-GRAHAM-SEXTON, INC., EMPLOYER, AND THE TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 2 July, 1930.)

1. Master and Servant F a—Compensation Act is to be liberally construed.

The provisions of the Workmen's Compensation Act are to be liberally construed to effectuate the legislative intent as gathered from the act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective the question of negligence.

2. **Master and Servant F g—Common-law wife of injured employee is not entitled to compensation under the act.**

   The common-law wife of a deceased employee is not entitled to compensation under the provisions of the Workmen's Compensation Act.

3. **Same—If injured employee has no dependents compensation is payable to his personal representative.**

   Where the death of an employee is compensable under the provisions of the Workmen's Compensation Act, and such deceased employee has no dependents, the compensation is payable to his personal representative for the benefit of his heirs under the provisions of the act.

4. **Master and Servant F h—Amount of compensation payable to personal representative is commutable under provisions of the act.**

   While there is no computed amount provided by section 40 of the Workmen's Compensation Act for payment to the personal representative of a deceased employee for death resulting from an injury compensable thereunder, the act provides the method by which such amount can be commuted, which is payable to the personal representative for the benefit of the heirs at law of the deceased employee.

APPEAL by plaintiffs from *MacRae, Special Judge,* at April Special Term, 1930, of HAYWOOD. Reversed.

This is an appeal by the plaintiffs, J. R. Gardner and F. E. Alley, Jr., administrators of the estate of George Herbert Reeves, alias George Wilson, from a judgment of his Honor, Cameron F. MacRae, at the April Term, 1930, of the Superior Court of Haywood County, setting aside an award of the North Carolina Industrial Commission in favor of said administrators.

The action was originally commenced before the North Carolina Industrial Commission, and arose out of a claim for compensation on account of the death of the said George Herbert Reeves, alias George Wilson, who was fatally injured while in the employ of the defendant, Parker-Graham-Sexton, Incorporated.

Compensation for the death of said Reeves, alias Wilson, was claimed by one Frances Wilson, the alleged common-law wife of the deceased, and by J. R. Gardner and F. E. Alley, Jr., administrators of the estate of said deceased.

The case was first heard before Honorable J. Dewey Dorsett, of the North Carolina Industrial Commission, at Waynesville, North Carolina, on 10 January, 1930, and thereafter, on 5 February, 1930, Commissioner Dorsett filed an opinion in said case in which he denied the claim of the said Frances Wilson, and made an award in favor of said administrators for $4,497.32, less actual burial expenses not to exceed $200.00.

On 14 February, 1930, the defendants appealed from the award of Commissioner Dorsett to the full Commission. The case was heard before the full Commission on 24 February, 1930, and, thereafter, an opinion for the full Commission was filed by Chairman Matt H. Allen, in which the findings of fact and award of Commissioner Dorsett were adopted and affirmed.

Thereafter, on 27 March, 1930, the defendants gave notice of appeal from the aforesaid award of the full Commission to the Superior Court of Haywood County, and the case was heard, on said appeal, before his Honor, Cameron F. MacRae, at the April Special Term, 1930, of the Superior Court of Haywood County. Judge MacRae rendered judgment affirming the award of the North Carolina Industrial Commission insofar as the claim of Frances Wilson was concerned, and set aside that part of the award granting compensation to said administrators.

It is admitted that at the time of his death the deceased was in the employ of the defendant, Parker-Graham-Sexton, Incorporated; that the injury resulting in the death of the deceased arose out of and in the course of his employment; that the employer and the deceased employee, at said time, were subject to the provisions of the North Carolina Workmen's Compensation Act; and that the average weekly wage of the deceased, at the time of his death, was $24.78.

Frances Wilson did not appeal from the awards of the North Carolina Industrial Commission, nor from the judgment rendered by Judge MacRae, denying her claim to compensation, and, therefore, her right to recover is not involved in this appeal.

To that part of the judgment rendered by Judge MacRae, setting aside the award of the Industrial Commission in their favor, said administrators duly excepted, assigned error and appealed to the Supreme Court.

J. R. Gardner and Alley & Alley for plaintiffs.
Rollins & Smathers for defendants.

CLARKSON, J. This matter has been fully discussed in Reeves *v.* Parker, Vol. 1, p. 277, Advance Sheets, North Carolina Industrial Commission, opinion by Dorsett, Commissioner. It is there held: (1) Common-law marriage not recognized by either North Carolina or Tennessee: therefore common-law wife not a widow under the act. (2) Under section 40, where deceased leaves no dependents, personal representative entitled to same amount as those wholly dependent," citing case of Freeman *v.* Motor Company, Vol. 1, p. 283, holding: "Deceased employee leaving no dependents, personal representative entitled to payment of commuted value of 60 per cent of average weekly wages of deceased for 350 weeks less funeral expenses."

An appeal was taken to the full Commission from the findings of fact and award, and the opinion of Commissioner Dorsett was affirmed and adopted.

Allen, chairman of the Commission, says: "It was admitted that plaintiff was duly and regularly employed by the defendant Parker-Graham-Sexton, Inc., and that the accident and death arose out of and in the course of his employment, and that his average weekly wages was $24.78. Upon the foregoing, Dorsett, Commissioner, ordered award, providing for the payment to Gardner and Alley, administrators, the sum of $4,497.32, less burial expenses not to exceed $200.00, this being the commuted value of $14.87 for three hundred and fifty weeks. . . . Upon the question as to the right of the personal representative to recover where there are no dependents, this Commission, in Freeman *v.* B. & N. Motor Co., *et al,* Docket No. 216, has held that the personal representative is entitled to recover the commuted value of sixty per centum of the average weekly wages of the deceased, less the burial expenses not to exceed $200.00."

We are now called upon to sustain or reverse the Industrial Commission. We think the opinion of the Commission should be upheld.

We have to construe two sections of the Workman's Compensation Law, Pub. Laws of 1929, chap. 120, as follows:

"Sec. 40. If the deceased employee leaves no dependents, the employer shall pay to the personal representative of the deceased the commuted amount provided for in section 38 of this act, less the burial expenses which shall be deducted therefrom."

"Sec. 38. If death results proximately from the accident and within two years thereafter, or while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this act in one of the methods hereinafter provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of accident, a weekly payment equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week for a period of three hundred and fifty weeks from the date of the injury, and burial expenses not exceeding two hundred dollars," etc.

This is a new act and should be liberally construed to effectuate the legislative intent to give compensation to workmen.

It was earnestly argued on the hearing by defendants that this act put the burden on industry and the General Assembly did not intend to provide compensation in those cases where a deceased employee leaves no dependents.

In the Freeman case, *supra,* at p. 326, opinion by Allen, chairman, says: "It is admitted by counsel for the defendant, and the Commission will take judicial notice of the fact, that the premium rates in North Carolina are based upon the payment to the personal representative in cases of death, where there are no dependents, of sixty per centum of the average weekly wages of the deceased at the time of his death. The rate-making authorities found the words of section 40 as plainly expressive of an intent, and accordingly fixed the rates."

The defendant, Travelers Insurance Company, having been paid the premium by defendant Parker-Graham-Sexton, Inc., employer, to pay compensation in death cases where there are no dependents, as in the present case, is hardly in a position to complain.

Section 71 of the act, latter part, in reference to the agreement of the insurer, says: "Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name."

The burden is on industry to repair material used in the operation of its works, and under this act the burden is to take care of the human wrecked or killed, whether having dependents or not, and that is the fine purpose of the act agreed upon by employer and employee. The act provides that the burden is not only to provide compensation for those who have dependents, but also for those who have no dependents. The intent of the act was to give equal rights upon the death of the employee who came within the language of the act, whether he has dependents or not. An employee's life is of value to dependents, and it is unthinkable that it should not be so to the next of kin.

We quote some of the pertinent sections of the act, showing that the General Assembly unquestionably made provisions that those who did not have dependents that the personal representatives had a cause of action:

Section 4 of the act: "From and after the taking effect of this act every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this act respectively to pay and accept compensation *for personal injury or death by accident arising out of and in the course of the employment,* and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided."

Section 11 of the act, in part: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, *shall exclude all other rights and remedies of such employees, his personal representative,* parents, dependents or next of kin, as against employer at common law, or otherwise, on account of such injury, loss of service, or death: *Provided, however,* that when such employee, his personal representative or other person may have a right to recover damages for such injury, loss of service, or death from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this act, and prosecute the same to its final determination; but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy. . . . The acceptance of an award under this act against an employer for compensation for the injury or death of an employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death; and such employer shall be subrogated to any such right, and may enforce, in his own name or in the name of the injured employee or his personal representative the legal liability of such other party. If the injured employee, his personal representative or other person entitled so to do, has made a claim under this act against his employer, and has not proceeded against such other party, the employer may, in order to prevent the loss of his rights by the passage of time, institute such action prior to the making of an award hereunder," etc. There are other provisions in this section not necessary to set forth.

Under the sections above quoted, according to the contentions of defendants, an employee who had no dependents, his life is worthless, no matter how negligent his employer may be. The Compensation Act, section 40, gives the personal representatives an action, as set forth in section 4, *supra,* "for personal injury or death by accident arising out of and in the course of the employment."

The Compensation Act discarded the theory of fault as the basis of liability and the act confers an absolute right of compensation on all those who come within the above provisions. The compensation is "for personal injury or death by accident arising out of and in the course of the employment." *Conrad v. Foundry,* 198 N. C., 723; *Johnson v. Hosiery Co., ante,* 38; *Chambers v. Oil Co., ante,* 28.

The latter part of section 2(b), says: "Any reference to an *employee* who has been injured shall, when the employee is dead, include *also his legal representative, dependents, and other persons to whom compensation may be payable.*"

The latter part of section 29, "In case of death the total sum paid shall be six thousand dollars, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the *personal representative of deceased.*"

The Court, in construing section 29, in *Smith v. Light Co.,* 198 N. C., at p. 621, says: "Sections 38 and 40, in clear language and in comprehensive detail, provide a legal method of determining compensation for fatal injuries. The last clause of section 29 is totally repugnant to the definite method of settlement prescribed in sections 38 and 40. Moreover, it cannot be merged or blended either with the spirit of the act or the language employed by the Legislature to convey and establish the intent of the lawmaker. Indeed, it is a sort of legal meteor wandering through legal space without substantial relation to any of the bodies which surround it." *Smith v. Collins-Aikman Corp.,* 198 N. C., 621.

All *through* the act "personal representative" is mentioned, indicating a fixed purpose by the General Assembly that compensation should be awarded, where there are no dependents, to the personal representative. While there is no commuted amount provided for in section 38, there is an amount which can be commuted. We think the opinion in *Smith v. Light Co., supra,* settles this matter. The opinion of the Industrial Commission, under the facts and circumstances of this case, express the intent of the act, and we see no reason to disturb the award made. The judgment of the court below is

Reversed.

P. D. EBBS v. ST. LOUIS UNION TRUST COMPANY AND E. W. GROVE, JR., EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF THE ESTATE OF EDWIN W. GROVE, AND ARTHUR SABIN.

(Filed 2 July, 1930.)

1. **Fraud A a—Knowledge and intent to deceive are necessary elements of fraud.**

Knowledge and intent to deceive are essential elements of actionable fraud, and where a real estate agent makes representations as to the character of construction of a house he is offering for sale without knowledge of their falsity, the purchaser may not maintain an action for damages for fraud and deceit, his remedy being, upon a proper showing of mutual mistake, for a rescission of the contract of purchase.

2. **Cancellation of Instruments A c—Where neither party has knowledge of falsity of representations made by one, contract may be rescinded.**

Where a real estate agent makes misrepresentations as to the character of construction of a house he is offering for sale without knowledge of their falsity, of which the purchaser is also ignorant, under proper pleadings for this relief the consummated transaction may be rescinded for the mutual mistake of the parties, and where it appears from the issues and instructions that the verdict was rendered upon the theory that the remedy sought was to recover damages for fraud and deceit, which under the facts of the case were not recoverable, a new trial will be awarded on appeal.

CIVIL ACTION, before *Johnson, Special Judge.* From BUNCOMBE.

On or about 26 March, 1927, the plaintiffs made an offer in writing to the Grove estate to purchase a certain house for the sum of $25,000. The real estate broker securing the contract was the defendant, Arthur Sabin. It was understood at the time that a special proceeding to perfect the title would be necessary. The defendant Sabin approached the plaintiff about 20 March, 1927, stating that he had a couple of stone houses belonging to the Grove estate which he desired to sell to the plaintiff. The plaintiff accompanied the defendant Sabin and examined a stone house on Kimberly Avenue. Thereafter the plaintiff made two or three trips to examine the house, both inside and out. The house was apparently built of stone taken in its natural state and laid in a unique way, which made the appearance of the house very attractive to the plaintiff. The agent, the defendant Sabin, represented to the plaintiff "that it was a perfectly constructed house in every way." Furthermore that it was "a stone house." There were certain minor repairs to be made which the agent agreed to have made in order to satisfy the plaintiff. Thereupon the plaintiff stated to the defendant Sabin: "Well, Mr. Sabin, if this house is what you recommend it to be, a perfect house, perfectly constructed, perfect house, and you will put these other things in that I have found here I will let you offer them $25,000 and arrange the terms, name the terms myself." Thereupon the plaintiff signed the offer of purchase to be submitted to the Grove estate. The offer was accepted by the defendant representing the Grove estate. Thereafter, realizing that it would require sometime to perfect the special proceeding to pass title, the plaintiff moved into the house the first of May. On 12 September the wife of plaintiff died and the plaintiff vacated the house on 14 September, leaving the furniture therein and listing the property for sale with certain real estate agents in Asheville for the sum of $32,500. The evidence tended to show that from May until December there was very little rain. About the fist of December heavy snow and rain began falling, and the plaintiff went to the house and found that the walls were wet and dripping and that there was a leak in the sunparlor. Thereafter, on 23 December, 1927, the plaintiff wrote a letter to the Grove estate stating that he would not take the house and that it would be useless to complete the proceeding to make title and demanded the return of an initial payment of $2,500. The Grove estate declined to return the money paid at the time of signing the agreement and offered to tender deed subject to the payment of the balance of cash payment and the execution and delivery of notes for the deferred payments. Shortly thereafter the plaintiff brought a suit against the defendants alleging that Sabin was the agent of defendants and that he had represented that the house was "a perfectly constructed house in every respect, of permanent and fire-proof nature, and that upkeep of same would never amount to anything" when as a matter of fact the house was of defective construction in that the mortar or masonry had not been water proofed and that as a result thereof the exterior walls of the house absorbed water causing the floors to swell out of alignment and the basement to be flooded with water.

Plaintiff further alleged that the defendant knew or by the exercise of reasonable and ordinary diligence should have known that the house at the time of sale was not a perfectly constructed house in every particular.

Upon such allegations the plaintiff asked for a rescission of the contract and for the recovery of $2,500 paid upon the purchase price and for damages in the sum of $2,500.

The defendants filed answer denying the allegations of the complaint and asking that the plaintiff be required to specifically perform the contract of purchase. In June, 1929, the plaintiff filed an amendment to the complaint setting out the fact that the house in controversy, "instead of being a stone and masonry house," was in fact a "stone veneer house"; that is to say, a house of wooden frame enclosed by a veneering of stone laid on concrete," etc. The evidence tended to show that the plaintiff had made this discovery a day or two before the trial.

The following issues were submitted to the jury:

1. "Was the plaintiff induced to execute the contract set out in the pleadings by the false representations as to the character and condition of the house referred to in the pleadings, made by the defendant, Arthur Sabin, as agent of his codefendant, as alleged in the complaint?"

2. "If so, were said representations made by said Sabin with knowledge of their falsity, as alleged in the complaint?"

3. "Is the plaintiff entitled to have said contract rescinded as alleged in the complaint?"

4. "What sum, if any, is plaintiff entitled to receive upon a rescission of said contract?"

5. "Was the contract referred to in the pleadings fairly executed by plaintiff without the concealment or suppression of material facts on the part of the defendants, or their agent?"

6. "Are the defendants, St. Louis Union Trust Company and other trustees, entitled to specific performance of the contract as alleged in the answer?"

The jury answered the first issue "Yes," the second issue "No," the third issue "Yes," and the fourth issue "Yes, $2,500 without interest," and the fifth and sixth issues were not answered.

The evidence tended to support the allegations of plaintiff.

The evidence further tended to show that plaintiff had every opportunity to thoroughly examine the house and did thoroughly examine it, and that nothing was done to prevent a full and thorough examination of the premises before signing the contract of purchase.

The judgment upon the verdict decreed "that the contract set out in the pleadings and the paper-writing exhibited to the complaint herein be, and the same hereby is, in all respects, rescinded, canceled, vacated, and set aside, to the end that the *status quo ante* as between the parties hereto, respectively, be restored as far as may be; and that the aforesaid contract, as and wherever, if at all, the same may appear of record upon the land or court records of Buncombe County be canceled and set aside." It was further adjudged that the plaintiff recover of defendants the sum of $2,500 together with the costs of the action.

From the judgment so rendered the defendant appealed.

Carter & Carter for plaintiff.

J. W. Haynes, Merrimon, Adams & Adams and J. W. Pless for defendant.

BROGDEN, J. The evidence, issues and verdict present this situation: A real estate agent makes certain false representations as to the character and condition of a house which he proposes to sell, but these representations are made without knowledge of their falsity, and hence as a necessary consequence without intent to deceive. It is therefore apparent that this action cannot be maintained by the plaintiff as a suit for damages for fraud and deceit. Scienter and intent to deceive are essential elements of actionable fraud. *Corley Co. v. Griggs,* 192 N. C., 171, 134 S. E., 406; *Peyton v. Griffin,* 195 N. C., 685, 143 S. E., 525.

If it be conceded that the action cannot be maintained as a suit for damages for fraud and deceit, the question then arises: Can it be maintained upon the theory of rescission? Ordinarily the right to rescind a contract is built upon fraud, mutual mistake or mistake of one party induced by the fraudulent or false representations of the other.

Apparently the verdict would support a judgment for rescission upon the ground of mutual mistake, for the reason that the plaintiff did not intend to buy a stone veneer house, nor did the defendant Sabin intend to sell such a house. But the case was not tried upon that theory. *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339.

The trial judge charged the jury as follows: "Now, gentlemen, if you should find from all the evidence, and by its greater weight, that the defendants, through their agent, made a false representation with respect to this property, bearing in mind the evidence I have recited to you bearing upon this, and the law I have given you, if you should find that by the greater weight of the evidence, then it would be your duty to answer the first issue yes. If you fail to so find it would be your duty to answer it "No." Again the court charged the jury: "If you should answer the first issue, "Yes," then the court charges you, as a matter of law, that you should answer the third issue "Yes."

The first instruction quoted above is to the effect that false representation without more would warrant the rescission of a contract, and the second instruction peremptorily directs the jury to answer the third issue as to rescission upon a finding of mere false representation.

Manifestly, if rescission is sought upon the ground of fraud, then actionable fraud with all its essential elements must be found by the jury. As mistake is neither set up in the pleadings nor submitted to the jury, we are of the opinion and so hold that the defendants are entitled to a new trial. Of course, if mistake had been invoked as a ground for rescission, positive representations by the agent, even though made through inadvertence would not preclude recovery. This idea was expressed in *Long v. Guaranty Co.,* 178 N. C., 503, 101 S. E., 11. "The written agreement by which the settlement was evidenced could not well be reformed and afford full and adequate relief, but this must be done by cancellation of the instrument and rescission of the contract of compromise and settlement, which was entered into by ignorance and mistake as to the true facts, induced by the positive representation of the defendant's agent, albeit that it was made without fraud, and by the inadvertence and mistake of the agent. By its own conduct, for that of the agent is imputed to it, the defendant has induced the plaintiff to a course of action which will greatly prejudice him, if it is not reversed, he being without any fault, but being misled as to material facts by the agent's assertion in respect to them."

New trial.

O. E. SMITH, ADMINISTRATOR OF NONNIE SMITH, v. C. R. WHARTON.

(Filed 2 July, 1930.)

Physicians and Surgeons C b—Where evidence does not tend to show that alleged negligence proximately caused damage nonsuit is proper.

Where in an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant physician in performing an operation on her, there must be sufficient evidence of a causal relation between the alleged acts of negligence and the injury, and where the evidence viewed in the light most favorable to the plaintiff fails to show that the alleged acts of negligence of the defendant, in failing to exercise due care to make an adequate examination of the deceased before the operation, and his alleged negligence in leaving her before she recovered from the effects of the anæsthetic without providing a nurse, were a proximate cause of the death of the intestate, the defendant's motion for judgment as of nonsuit is properly allowed.

CLARKSON, J., concurring in result.

APPEAL by plaintiff from *MacRae, Special Judge,* at October Special Term, 1929, of ROCKINGHAM. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, caused, as alleged in the complaint, by the negligence of the defendant, a physician and surgeon, who, at the request of the plaintiff, had performed an operation on said intestate about one hour before her death.

Plaintiff's intestate, Nonnie Smith, was his wife. She died on 30 May, 1928, at plaintiff's home in Rockingham County. At the date of her death she was eighteen years of age. For several months prior to her death, she was pregnant, with her first child. She had been under the professional care of the defendant, who was engaged in the practice of medicine in Rockingham County, since 16 February, 1928. She was expecting to be confined during the month of June.

Examinations made by defendant from time to time, at his office, prior to 29 May, 1928, disclosed that she was in good physical condition, despite the fact that her feet and legs had begun to swell. On 29 May, 1928, an examination made by defendant at his office showed that her kidneys were in bad condition. Defendant advised plaintiff that her kidneys were poisoned and that an immediate operation was advisable for the purpose of delivering the child. After some discussion between plaintiff and defendant as to whether the operation should be performed in a hospital or at plaintiff's home, upon defendant's advice that the operation was simple, and that he could perform it, with the assistance of another physician, at plaintiff's home, it was decided that the operation should be performed the next day at plaintiff's home.

At about 9 o'clock on the morning of 30 May, 1928, defendant went to the home of plaintiff. Upon being advised that his patient had taken salts the night before, as he had prescribed, that she had taken nothing except a cup of coffee and a glass of milk for breakfast, and that she was feeling all right, defendant, accompanied by plaintiff, went to Reidsville to make arrangements to secure the assistance of another physician.

Defendant and the assistant physician went to plaintiff's home, arriving there at about twenty minutes to eleven o'clock. After the assistant physician had examined the patient in the presence of the defendant, to ascertain the condition of her heart, they began the operation at fifteen minutes to eleven. During the operation, chloroform was administered to the patient. When the operation was concluded at 12 o'clock, she was "asleep," from the effects of the chloroform. The assistant physician remained at the home of the plaintiff for about five minutes after the operation was concluded, and then left. The defendant remained for thirty or thirty-five minutes. During this time, he was in the room with the patient, and frequently examined her pulse, and observed her condition. Before leaving, defendant told the plaintiff that his wife was getting along all right, that he had other patients whom he must visit, and that he would meet plaintiff in his office at one o'clock, to give him medicine for his wife. Plaintiff left his home about ten minutes to one o'clock and went in his automobile to the office of defendant—a distance of about three miles. Defendant met the plaintiff at his office, and gave him medicine for his wife. While plaintiff was away from his home, his wife died, suddenly. Only her mother and members of the family were present when she died. None of them was a competent nurse. There was evidence tending to show that just before her death, she had a severe hemorrhage. She did not fully recover from the effects of the chloroform or of the shock incident to the operation, prior to her death.

In his complaint, plaintiff alleged that defendant was negligent, first, in that he failed, by the exercise of due care, to properly prepare his patient, plaintiff's intestate, for the operation, and second, in that after the operation, and before his patient had recovered from the effects of the anæsthetic administered to her during the operation, and from the shock incident thereto, he left her without making provision for the presence of another physician or of a competent nurse; and that such negligence was the direct and proximate cause of the death of plaintiff's intestate. On these allegations, plaintiff demanded judgment that he recover of defendant the sum of $50,000, as damages.

At the close of the evidence for the plaintiff, on motion of defendant, the action was dismissed as of nonsuit.

From the judgment dismissing the action, plaintiff appealed to the Supreme Court.

Dillard S. Gardner and P. T. Stiers for plaintiff.
King, Sapp & King and Glidewell, Dunn & Gwyn for defendant.

CONNOR, J. Applying the well settled rule uniformly enforced in this jurisdiction with respect to the consideration of the evidence on a motion for judgment as of nonsuit, made as provided by C. S., 567 (*Goss v. Williams,* 196 N. C., 213, 145 S. E., 169, *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356, *Oil Co. v. Hunt,* 187 N. C., 157, 121 S. E., 184, *Christman v. Hilliard,* 167 N. C., 4, 82 S. E., 949), to the evidence in the instant case, we are of the opinion that there was no error in the judgment dismissing this action at the close of the evidence for the plaintiff. Considering the evidence in the light most favorable to the plaintiff, and giving him the benefit of every reasonable intendment, and of every reasonable inference which can be drawn therefrom, as we are required to do by the rule, we concur in the opinion of the trial court that there was no evidence from which the jury could have found that plaintiff is entitled to recover of the defendant in this action. The judgment must therefore be affirmed.

Conceding, but not deciding, that there was evidence tending to show that defendant was negligent as alleged in the complaint, in that he failed to exercise due care to make an adequate examination of his patient before the operation, or in that he left his patient, even temporarily, after the operation and before she had recovered from the effects of the anæsthetic and from the shock incident to the operation, without exercising due care to provide a competent nurse for her, we fail to find, after a most careful consideration of all the evidence, induced by sympathy for the plaintiff in the loss which has befallen him by the untimely death of his young wife, any evidence legally sufficient to show a causal relation between the acts of the defendant, either of commission or of omission, and the death of plaintiff's intestate. The evidence tending to show that his patient died within an hour after the operation, which he had performed on her, and before she had recovered from the effects of the anæsthetic administered to her under his direction, or from the shock incident to the operation, does not show that her death was caused by any breach of duty which he owed her, as her physician. The burden was on the plaintiff to show by evidence, not only that defendant was negligent as alleged in his complaint, but also that his negligence was the direct and proximate cause of her death. Accepting the testimony of all the witnesses as true, and conceding that the weight of the evidence is a matter for the jury and not for the court, this evidence was not of such character as reasonably to warrant the inference of all the facts which plaintiff had alleged in his complaint as constituting his cause of action against the defendant. Under the law as declared by this Court, it is not sufficient that the evidence raises merely a surmise or conjecture that the facts may be as plaintiff has alleged in his complaint. Unless the evidence tends reasonably to show all the facts to be as plaintiff has alleged in his complaint, as essential to his right to recover in the action, it should not be submitted to the jury. In that case, the action should be dismissed, on a motion made in accordance with the provisions of C. S., 567. In *Byrd v. Express Co.,* 139 N. C., 273, 51 S. E., 851, it is said: "The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established, and the negligent act of the defendant must not only be the cause, but the proximate cause of the injury. The burden was therefore upon the plaintiff to show that defendant's alleged negligence proximately caused his intestate's death, and the proof should have been of such character as reasonably to warrant the inference required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact." See *Pangle v. Appalachian Hall,* 190 N. C., 833, 131 S. E., 42. The principle is approved in *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854, where it is said that the foregoing is a correct statement of the law in this jurisdiction.

We do not decide the question discussed in the briefs filed in this Court, as to whether in the absence of testimony of expert witnesses tending to show that defendant, a physician and surgeon, failed to exercise the care ordinarily required of men of his profession, with respect to patients, under circumstances similar to those in the instant case, plaintiff was not entitled to recover in this action, for that there was no evidence from which the jury could find that he was negligent. This question does not necessarily arise on this appeal, and does not seem to have been presented heretofore to this Court. The decisions of other courts are not uniform. We do not deem it wise to discuss or to decide the question until it shall be necessary for us to do so. We have had occasion recently in *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356, to review the decisions of this Court, and of other courts, in cases involving the duties which the law imposes upon physicians and surgeons with respect to their patients. It would seem that while there may be cases in which the plaintiff is not required to offer as evidence to sustain his allegation that defendant has been negligent because of his failure to perform one or more of these duties, the testimony of experts tending to show such breach, there may be other cases in which the failure to offer such evidence must result in a judgment dismissing the action. In the opinion of *Taft, Circuit Judge,* in *Ewing v. Goode,* 78 Fed., 442, which is generally regarded as a leading case on this question, it is said:

"In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts, and accept or reject the statements of experts; but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury."

In the instant case, the judgment dismissing the action as upon nonsuit, is affirmed for the reason that there was no evidence from which the jury could have found that the negligence of defendant as alleged in the complaint, was the direct and proximate cause of the death of plaintiff's intestate. It does not appear that if defendant, another physician or a competent nurse had been with her, she would not have died, nor does it appear that her death was the result of her condition prior to the operation which could have been discovered by any examination which it was the duty of the defendant to make. A physician and surgeon is not an insurer of the life of his patient; even where he has failed to exercise due care in the treatment of his patient, or in the performance of an operation, he cannot be held liable for the death of his patient, in the absence of evidence legally sufficient to show that his negligence was the cause of the death.

Affirmed.

CLARKSON, J., concurring in result.

J. THOMPSON WARE AND J. G. WARE v. T. B. KNIGHT.

(Filed 2 July, 1930.)

1. **Ejectment A a—Plaintiff may show title by adverse possession in action in ejectment.**

   In an action in ejectment the plaintiff may undertake to establish his title by sufficient adverse possession under known and visible lines and boundaries.

2. **Ejectment D b—In this case held: issue of fact as to line called for in deed was raised and submitted to jury under correct instructions.**

   Where both parties in an action in ejectment claim title by adverse possession, the plaintiff claiming presumptive possession to the outside boundaries of his deed, with conflicting evidence as to the boundaries called for in the deed: *Held*, an issue of fact is raised for the determination of the jury, and where a court survey, made and used without objection of either party, is introduced in evidence, a reference to the map as the "court map" by the trial court in his charge to the jury will not be held for reversible error, it appearing that an intelligent jury must have understood the correct instructions in regard thereto.

3. **Adverse Possession A b—Constructive possession under deed having known boundaries extends to outer boundaries of the deed.**

Where one enters and occupies a tract of land under a deed having known and visible lines and boundaries, the law will ordinarily extend the force and effect of such possession to the outer boundaries of the deed, and where there is conflicting evidence as to the lines called for in the deed, the question of the amount of land occupied under presumptive possession under the deed is to be determined by the verdict of the jury as to the lines called for therein.

ADAMS, J., dissenting.

CIVIL ACTION, before *MacRae, Special Judge,* at October Special Term, 1929, of ROCKINGHAM.

This was an action of ejectment. The plaintiffs introduced a deed from Carrow, United States Marshal, to Stephen A. Douglass, dated 20 August, 1872, and recorded in May, 1874; also a deed from said Douglass to plaintiff J. Thompson Ware, dated 28 November, 1874, and recorded on 22 May, 1875. There was testimony in behalf of plaintiffs that they went in possession of the property in 1872 under a contract with said Carrow, and have lived upon said land since the purchase. The defendant claimed title under certain deeds made by Roberts and recorded in 1881, and deed from Vaughan, commissioner, recorded in 1890.

The evidence further discloses that the defendant built a small house upon the land claimed by the plaintiffs. There was also testimony by the man who built the house that it was constructed about 1906. There was testimony to the effect that the house might have been built a few years earlier than that date. The contract price for the house was $15.00 and one-third of the contract price was paid by five gallons of liquor at one dollar per gallon. The plaintiff built a shop on the land near the place where the tenant house was afterwards constructed.

There was much evidence with respect to adverse possession by both parties.

The issues were as follows:

1. "Is the plaintiff the owner of and entitled to the possession of the land shown on the court map between the red line and the solid white lines on the east and south?"

2. "What amount of damages, if any, is the plaintiff, J. Thompson Ware, entitled to recover for the wrongful detention of said land?"

3. "Is the plaintiff's action barred by the statute of limitations?"

The jury answered the first issue "Yes," and the second issue, "$150.00."

From judgment upon the verdict the defendant appealed.

Sharp & Sharp for plaintiff.
Brown & Trotter and Glidewell, Dunn & Gwyn for defendant.

BROGDEN, J. The plaintiff undertook to prove title by showing possession under known and visible lines and boundaries for twenty-one years before the action was brought. Such method of proving title in ejectment suits has been approved and established. *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627.

The defendant contended that the plaintiff had never been in actual possession of the small area of land in dispute; but, the plaintiff having gone into possession under a proper deed of conveyance older than that held by the defendant, relied upon the principle of constructive possession. The pertinent principle of law was thus stated in *Hayes v. Lumber Co.,* 180 N. C., 252, 104 S. E., 527: "That when one entered and occupied a tract of land, asserting ownership under deeds having known and visible lines and boundaries, the law would ordinarily extend the force and effect of his possession to the outer boundaries of his claim as set forth in his deeds, and on the facts in evidence, if accepted by the jury, the determination of the rights of the parties would depend largely on whether the boundaries of plaintiff's deeds by correct location covered the land in dispute. This ruling of the court is in accord with our decisions on the subject, and under it the jury, accepting plaintiff's version of the controversy, have rendered a verdict in her favor, and we find no valid reason for disturbing the results of the trial." *Ray v. Anders,* 164 N. C., 311, 80 S. E., 403.

The plaintiff contended that the line in dispute called for a Spanish oak, and the defendant contended that the proper call was a pine. A court survey had been ordered and a map was made in pursuance of such order, which was used by both parties at the trial. The contentions of the parties as to the disputed call were submitted to the jury.

Certain exceptions were taken to the charge of the court referring to what was designated as the court map. However, the record discloses that the map was used by both parties and the contentions were thoroughly arrayed in detail, and a jury of intelligent men could not have failed to understand that the location of the disputed corner depended upon whether such corner was a Spanish oak as contended by the plaintiff, or a pine as contended by the defendant.

There was ample evidence of adverse possession of the *locus in quo* by both parties. Hence, in the main, the cause was resolved into an issue of fact. This issue of fact was found in favor of the plaintiff, and we perceive in the record no error of law warranting another trial.

No error.

Adams, J., dissenting: This is an action for the recovery of land, superseding the former action of ejectment, but retaining certain of its features.

"In ejectment the plaintiff must recover on the strength of his own title and not on that of the weakness of his adversary; it must be good against the world or good against the defendant by estoppel. It can make no difference whether the defendant has the title or not, the sole inquiry being whether the plaintiff, upon whom rests the burden, has it. If he fails to show that he has the title and right of possession, it does not concern him what right or title the defendant has, if any, or whether he has any at all." *Pope v. Pope,* 176 N. C., 283. This statement of the law has received frequent approval of the Court. *Duncan v. Duncan,* 25 N. C., 316; *Clark v. Diggs,* 28 N. C., 159; *Mobley v. Griffin,* 104 N. C., 112; *Rumbough v. Sackett,* 141 N. C., 495; *Singleton v. Roebuck,* 178 N. C., 201; *Moore v. Miller,* 179 N. C., 396.

The various methods by which a plaintiff may establish his title are specifically set forth in *Prevatt v. Harrelson,* 132 N. C., 250, and *Mobley v. Griffin, supra.*

As pointed out in the opinion of the Court, "the plaintiff undertook to prove title by showing possession under known and visible lines and boundaries for twenty-one years before the action was brought." The action was brought on 9 November, 1914; title to the land, therefore, was not conclusively deemed to be out of the State, as provided in C. S., 426, because this section has no application to actions brought prior to 1 May, 1917.

The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the State to the same . . . when the person in possession thereof, or those under whom he claims, has been in possession under colorable title for twenty-one years, this possession having been ascertained and identified under known and visible lines and boundaries. C. S., 425.

Title not having been granted by the State the plaintiff could make out his case by showing open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought *(Moore v. Miller, supra),* or by showing adverse possession for thirty years without color. *Mobley v. Griffin, supra.* In either event it would be necessary for him to show the requisite possession. His paper title without possession is unquestionably insufficient.

With these facts in mind, turn to the following instructions which were given to the jury and excepted to by the appellant: "As to the first issue: 'Is the plaintiff the owner of and entitled to the possession of the land shown on the court map between the red lines and the solid white line on the east and south?' If you find from the evidence and by its greater weight that the eastern line of the land described in the complaint, as shown on the court survey, extends from the northeast corner of the map as shown by the survey to the point on the court map indicated as the southeast corner, and if you find that the southern line of the land in controversy runs as shown on the court map, then you will answer the first issue Yes. Is the plaintiff the owner of and entitled to the possession of the land shown on the court map between the red line and the solid white line on the eastern side? If you find by the greater weight of the evidence, if the plaintiff has satisfied you by the greater weight of the evidence that the white line as shown on the map is the true and correct line of the land according to the description contained in the complaint, you will answer that issue Yes, and if the plaintiff has failed to so satisfy you, nothing else appearing, you will answer that issue No."

These instructions are inaccurate and defective. In substance they direct the jury to find that the plaintiff is the owner of the controverted land if certain lines are located as the plaintiff contends. But the mere location of boundaries does not entitle the plaintiff to recover land. Here the plaintiff claims under three deeds, the last from his father. His title, as stated, is dependent upon sufficient possession with or without color; but the instructions utterly disregard and ignore the question of possession. Even where one claims to occupy land and to assert title under conveyances having visible lines and boundaries, relying upon the theory that the law extends his occupation to the outer lines of his deeds, it is necessary to prove actual possession of some part of the land. But the principle by which possession is extended to the outer boundaries of a conveyance does not apply where there is a lappage and adverse occupation of the land contained in the lappage. *Mintz v. Russ,* 161 N. C., 538.

The instructions not only deprived the defendant of his legal right to insist upon this defense, but they enabled the jury to award the land to the plaintiff without proof of title in compliance with any of the recognized requirements. I think there are other errors in the record, to which it is not necessary more particularly to advert.

Because of these errors the appellant, in my opinion, is entitled to a new trial.

IN RE ESTATE OF ARTHUR PRUDEN.

(Filed 2 July, 1930.)

Insurance N a—Upon death of beneficiary of War Risk insurance proceeds are to be distributed according to canons of descent as of death of insured.

Under the amendment to the War Risk Insurance Act, which is retroactive as well as prospective in effect, upon the death of the beneficiary named in the policy the proceeds are to be distributed according to the canons of descent as of the death of the insured, and where the insured soldier dies leaving him surviving his mother, the beneficiary in the policy, and a brother and sister, upon the death of the mother the brother and sister are entitled to the monthly payments under the policy as statutory beneficiaries, and upon the death of the sister her children are entitled to the cash value of the payments due her as her heirs at law to the exclusion of the brother of the insured, who is entitled only to the monthly payments due him under the policy.

CIVIL ACTION, before *Sinclair, J.*, 23 October, 1929. From GATES.

The agreed facts are substantially as follows:

Arthur Pruden, a soldier in the American Army, contracted for and received from the Bureau of War Risk Insurance a certificate or policy in the sum of $5,000. The mother of said soldier, to wit, Mary Elizabeth Brothers, was named as sole beneficiary therein. Arthur Pruden, the soldier, died intestate and unmarried on 26 January, 1920. At the time of his death he left surviving his mother, aforesaid, a sister, Ada Pruden Harrell, and a brother, Richard Pruden. The mother, as beneficiary named in the policy, received payments from the Treasury Department upon said policy until her death on 26 December, 1920. At the time of her death she left two children, to wit, Richard Pruden and Ada Pruden Harrell, who were the brother and sister of the deceased soldier. Thereafter, the Bureau of War Risk Insurance awarded the insurance equally to Richard Pruden and Ada Pruden Harrell, paying to each of said persons the sum of $14.37 per month. Richard Pruden, brother of the deceased, is still living and receiving the award of $14.37 per month. Ada Harrell, sister of the deceased, received her award of $14.37 per month until her death on 19 March, 1926. At the time of her death Ada Harrell left a husband, George Harrell, and two children, to wit, Carmen Harrell, 9 years of age, and Mary Harrell, 5 years of age. On 1 January, 1927, F. L. Nixon was duly appointed administrator of the estate of Arthur Pruden, deceased, and the Bureau of War Risk Insurance has paid to said administrator the sum of $1,901, which represents the principal of the unpaid installments heretofore awarded Ada Harrell.

Upon these facts Richard Pruden, brother of the soldier, claims one-half of said sum as next of kin of the deceased soldier. The minor children of Ada Harrell claim said sum through their mother, Ada Harrell. The father of said minors, to wit, George Harrell, makes no claim so far as this record discloses.

Upon the foregoing facts it was adjudged by the clerk of the court "that the administrator of Arthur Pruden do pay to the personal representatives of Ada Harrell or to her heirs at law, the lump sum payment of the residue of her $14.37 per month, to 26 January, 1940, had she lived to that time, now in his hands, after first deducting the cost and a reasonable attorney's fee."

From the foregoing judgment Richard Pruden appealed to the judge of the Superior Court, who affirmed the judgment of the clerk, and thereupon the said Richard Pruden appealed to this Court.

John Hill Paylor for plaintiff.
J. M. Glenn for defendant.

BROGDEN, J. The paramount question of law is this: Did Ada Harrell have a vested right in the proceeds of the insurance paid to the administrator of Arthur Pruden by the United States Veterans' Bureau?

The overwhelming weight of authority, as we interpret the decisions, is to the effect that war risk insurance constitutes a part of the *corpus* of the estate of the insured. *Petition of Robbins*, 140 Atlantic, 366; *Williams v. Eason,* 114 Southern, 338; *In re Dean's Estate,* 225 N. Y. S., 543; *In re Ogilvie's Estate,* 139 Atlantic, 826; *McDaniel v. Sloan,* 11 S. W. (2d Series), 894; *Palmer v. Mitchell,* 158 N. E., 187, 55 A. L. R., 596. The author of an extensive note in 55 A. L. R., 596, says: "The question has arisen in a number of cases as to whether those entitled to 'the estate of the insured' under the amendment should be determined as of the date of the death of the insured, or as of the date of the death of the beneficiary. With the exception of but one jurisdiction, as noted hereafter, the courts passing upon the question have uniformly held that the date of the death of the insured is the time by which such questions should be determined, and not the date of the death of the beneficiary."

The identical question was considered by this Court in the case of *Trust Co. v. Brinkley,* 196 N. C., 40, 144 S. E., 530, in which case we adopted the prevailing rule.

Who, then, under our statute, were the distributees of the soldier at the date of his death, to wit, on 26 January, 1920? Our statute of distribution is C. S., 137. Subsection 5 of said statute is as follows: "If there is neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of kin of the intestate, who are in equal degree, and those who legally represent them." The pertinent part of subsection 6 is as follows: "If, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, the estate shall be equally divided between the father and mother. If one of the parents is dead at the time of the death of the child, the surviving parent shall be entitled to the whole of the estate," etc. Under our statute the mother of Richard Pruden, at the time of his death, was his sole distributee. In *Wells v. Wells,* 158 N. C., 330, 74 S. E., 114, this Court said: "The next of kin of the intestate is his mother. His brother and sisters are one degree further removed. It follows, therefore, that the mother is entitled to half of the personalty." Therefore, under our statute, and under the facts appearing in the record, the mother of the soldier was his sole distributee and entitled to his personal property. The mother died intestate, leaving two children, to wit, Richard Pruden, brother of the deceased soldier, and Ada Harrell, sister of said deceased. Hence the children of the mother were entitled, under our statute, to receive her personal property.

The Bureau of War Risk Insurance, upon the death of the mother, awarded the insurance in equal proportions, to wit, $14.37 per month, to the brother, Richard Pruden, and the sister, Ada Harrell, under and by virtue of the law then in effect, which provided in substance that upon the death of a beneficiary before receiving all the installments the insurance would be paid to the person or persons within the permitted class of beneficiaries as would under the laws of the State of the residence of the insured be entitled to his personal property in case of intestacy. Hence, Richard Pruden and Ada Harrell were statutory beneficiaries by virtue of the fact that they were within the permitted class and would have taken the personal property of the insured under the law of North Carolina if such insured had died intestate. Thereafter the statute was amended by Congress providing that upon the death of the beneficiary before receiving all of the 240 installments "there should be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of the date of last payment made under any existing award: *Provided,* that all awards of yearly renewable term insurance which were in course of payment on 4 March, 1925, shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this chapter. . . . This section shall be deemed to be in effect as of 6 October, 1917." U. S. C. A., Title 38, section 514.

It is contended by the brother, appellant herein, that, under the existing law, he will still receive his award of $14.37 per month, and that in addition thereto he is entitled to receive one-half of the proceeds of the award heretofore made to his sister, Ada Harrell. This position cannot be maintained.

The mother of the deceased soldier was entitled to his personal property at his death, not as beneficiary in the policy, but as distributee under the law of North Carolina. Ada Harrell, upon the death of her mother, became entitled to one-half of her mother's property not as a statutory beneficiary, but under the intestate laws of this State. It has been generally held by the courts that beneficiaries, after the death of the insured, have no vested interest therein, and all amendments to the statute regulating war risk insurance and declared to be retroactive, have been upheld. *White v. U. S.,* 270 U. S., 175, 70 L. Ed., 530. While the Federal statute provides that upon the death of any beneficiary the proceeds of the insurance shall revert to "the estate of the insured," such reverter is intended to refer to the distribution of the estate according to the law of the State of residence of the deceased soldier, and hence such funds are paid to the estate of the insured from time to time merely for the purpose of distribution according to law. *Trust Co. v. Brinkley,* 196 N. C., 40, 144 S. E., 530; *Condon v. Mallon,* 30 Fed. (2d Series), 995; *Williams v. Eason, supra; Bank v. McNeal,* 145 S. E., 549; *In re Jacob's Estate,* 136 Atlantic, 536; *In re Singer's Estate,* 213 N. W., 479; *Battaglia v. Battaglia,* 290 S. E., 296.

We are therefore of the opinion, and so hold that the judgment of the trial court awarding the proceeds to the personal representative of Ada Harrell is correct and the same is

Affirmed.

CHARLES T. ZIMMERMAN v. BOARD OF EDUCATION OF BUNCOMBE COUNTY ET AL.

(Filed 20 August, 1930.)

Schools and School Districts E c—Operation of junior college in city of Asheville is within discretion of board of education.

Where the board of commissioners of a city, constituting a special charter school district, under statutory authority have established and maintained, as a part of the public school system of the city, a junior college, the operating expenses of the college being paid from a special tax validly levied and collected in the city, and the general school fund of the district, derived from money apportioned from the general school fund of the county and from the special tax, is sufficient to pay the expenses of operating the elementary and high schools of the city for the constitutional term, and also for the operation of the junior college, and later the special charter school district is changed by statute to a local tax school district, the statute providing that the standard of education in the city be maintained and that the special tax remain in force and that the control of the schools of the city be vested in the board of education of the county with the same powers and duties as were conferred upon the board of commissioners of the city: *Held*, the board of commissioners of the city had the power, in the exercise of their discretion, to operate and maintain the junior college, and the board of education of the county, as its successor, has the power to operate the said junior college, certainly so long as no additional tax is required therefor, and the granting of an order restraining the board from operating the college in its discretion is error.

APPEAL by defendants from *Johnson, Special Judge,* at April Term, 1930, of BUNCOMBE. Reversed.

This is a controversy without action (C. S., 626), involving the opposing contentions of the parties hereto, with respect to the power of the defendants to continue the operation of a junior college as a part of the public school system of the city of Asheville.

The plaintiff, a resident and taxpayer of the city of Asheville, upon the facts agreed, contends that the defendants have no power to maintain or to continue to operate the junior college heretofore established and operated as a part of the public school system of the city of Asheville, and to pay the expense of such operation out of the public school fund of said city. Upon the facts agreed, plaintiff prays judgment that defendants be enjoined from continuing the operation of said junior college as a part of the public school system of said city, as defendants have declared it is their purpose to do.

The defendants, the board of education of Buncombe County, and the school committee or school board of the city of Asheville, upon the facts agreed, contend that they have the power, in the exercise of the discretion vested in them by statute, to maintain and to continue to operate said junior college and to pay the expense of such operation out of the school fund available for the operation of the public school system of the city of Asheville. Upon the facts agreed, defendants pray judgment that plaintiff is not entitled to a judgment enjoining them from maintaining and continuing to operate said junior college.

Upon consideration of the facts agreed, the court was of the opinion that the junior college heretofore established and operated in the city of Asheville, as a part of the public school system of said city, is not a part of the public school system of the State of North Carolina, within the meaning of the Constitution of this State, and of the general school law enacted by the General Assembly, and that, therefore, the defendants are without power to maintain and operate said junior college, and to pay the expense of such maintenance and operation out of the public school fund available for the support of the public school system of the city of Asheville.

In accordance with this opinion, it was ordered and adjudged that defendants be and they were enjoined perpetually from maintaining and operating said junior college, and from paying the expense of such maintenance and operation out of the public school fund of the city of Asheville, as a local tax school district.

From the judgment rendered defendants appealed to the Supreme Court, assigning error on their exception to the judgment.

Anderson & Howell for plaintiff.
George Pennell and Chas. N. Malone for defendants.

CONNOR, J. Prior to 30 April, 1929, the territory embraced within the corporate limits of the city of Asheville was a special charter school district, by virtue of the provisions of chapter 16, Private Laws of North Carolina, 1923, which is entitled "An act to amend, revise and consolidate the statutes that constitute the charter of the city of Asheville." The board of commissioners of said city was expressly charged by said statutory provisions with the duty of maintaining in the city of Asheville an "adequate and sufficient system of public schools," and for that purpose was authorized and empowered to construct and maintain in said city proper school buildings which should be under its control and subject to its disposition. The said board of commissioners was also authorized and directed to apply the public school fund of the city of Asheville, exclusively, to the support of the public schools of said city. This public school fund was derived, in part, from money apportioned to said special charter school district from the general school fund of Buncombe County, and, in part, from money raised by a special tax duly authorized and levied and collected in said district.

Prior to 30 April, 1929, the board of commissioners of the city of Asheville, in the exercise of the power conferred by statute upon said board, with respect to the public schools of said city, established and maintained as a part of the public school system of said city a junior college, paying the expense of said junior college out of the public school fund of said city. The said junior college has been given an official rating by the Department of Public Instruction of the State of North Carolina as a standard junior college, in accordance with the requirements of the Southern Association of Colleges and Secondary Schools. Tuition in said college was free to all students who were residents of the city of Asheville. Applicants for admission to said college were required to show by certificate or by examination that they had completed the course of instruction prescribed by law for a standard high school. There were no requirements as to age for admission to said junior college.

The cost of operating said junior college for a full term of nine months in each school year has been approximately $30,000. This sum has been paid out of funds derived from the special tax levied and collected in the city of Asheville. In addition to maintaining and operating said junior college, the said board of commissioners maintained and operated in the city of Asheville as parts of the public school system of said city, both elementary and high schools, in accordance with the requirements of the general school law of this State. These schools were maintained and operated for a full term of nine months in each school year, and in all respects complied with the provisions of the general school law of the State, with respect to elementary and high school instruction.

On and prior to 30 April, 1929, the board of commissioners of the city of Asheville, which was then a special charter school district, maintained and operated in said district, a public school system consisting of (1) kindergarten schools (see *Posey v. Board of Education, post,* 306); (2) elementary schools, composed of seven grades; (3) high schools, composed of four grades; and (4) the junior college. The school fund of said special charter school district, derived from money apportioned to said district from the general school fund of Buncombe County, and from money derived from special taxes levied and collected in said district, was sufficient to pay the expense of maintaining the said public school system, for a term of nine months in each school year. This was the public school system which the board of commissioners of the city of Asheville, in the exercise of power conferred upon said board, established and maintained in said city, as, in its best judgment, adequate and sufficient for the city of Asheville. Prior to this controversy without action, no question seems to have been raised by any citizen of this State or by any resident or taxpayer of said city with respect to said school system, or with respect to its maintenance and operation by said board.

As a result of an election held on 30 April, 1929, pursuant to the provisions of chapter 205, Private Laws of North Carolina, 1929, the Asheville Special Charter School District became, for certain purposes, the Asheville Local Tax School District. This change in name was made, as appears from the statute, solely for the purpose of taking the control and management of the schools of the district from the board of commissioners of the city of Asheville and vesting such control and management in the defendants. It was expressly provided by the statute authorizing the change, that after such change was made, "the public school system of the Asheville Local Tax District shall be under the supervision and control of the superintendent and the board of school committeemen herein appointed, it being intended by this section to direct that the present standard of education in the public schools of the city of Asheville shall be maintained." It was also provided in said statute that the special taxes "heretofore voted in the city of Asheville for the maintenance and operation of the public schools of the city shall remain in full force and effect."

It appears from the statement of facts agreed upon which the question involved in this controversy without action was submitted to the Court, that the predecessors of the defendants, in the exercise of their best judgment, established as a part of an adequate and sufficient system of public schools for the city of Asheville, the junior college. That they had the power to establish and maintain said college, in the exercise of this discretion, it seems to us cannot be questioned. The public school fund available for the support of the public school system of the city of Asheville was sufficient not only to support the elementary and high schools, which composed a part of said system, but was sufficient also to support the kindergarten schools, which the said board was required by statute to establish and maintain. *Posey v. Board of Education, supra.* Said fund was also sufficient to support the junior college. No additional tax was required to provide funds for the support of said public school system, or any part of it. It is true the establishment and maintenance of the junior college was not mandatory, as was the case with the kindergarten schools, by special statute, chapter 16, Private Laws of North Carolina, 1923, and as was the case with the elementary and high schools, under the general school law of the State. C. S., 5386. The board of commissioners of the city of Asheville had the power, however, in the exercise of their discretion to establish, maintain and operate the junior college, as a part of an adequate and sufficient system of public schools for the city of Asheville, which was at that time a special charter school district and not subject to the limitations in the general school law of the State, with respect to schools maintained and operated in accordance with its provisions.

By virtue of the provision of chapter 205, Private Laws of North Carolina, 1929, the election provided for therein having resulted favorably to the extension of the corporate limits of the city of Asheville, the defendants, as the successors of the board of commissioners of the city of Asheville, have the same powers and are under the same legal duties as said board with respect to the public schools of the city of Asheville. We are of opinion that the defendants have the power in the exercise of their discretion to continue to operate the junior college heretofore established and maintained by their predecessor, the board of commissioners of the city of Asheville, certainly so long as they can do so without the levy of an additional tax for that specific purpose. If defendants shall, at any time hereafter, find that they cannot operate the said junior college, without impairing the efficiency of the elementary and high schools, and of the kindergarten schools, now forming in part the public school system of the city of Asheville, they have the power, in the exercise of their discretion, to close the said junior college, and cease its operations. We find no statute making the operation of said junior college mandatory. Its continued maintenance and operation is within the discretion of the defendants. The exercise of such discretion by defendants is not subject to judicial review. *School Committee v. Board of Education,* 186 N. C., 643, 120 S. E., 202.

In accordance with this opinion, the judgment, enjoining the defendants from continuing the operation of the junior college, is

Reversed.

D. O. McLEMORE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 August, 1930.)

1. **Carriers B a—Agreement to furnish shipping facilities for crop to be planted is too indefinite to be enforceable as contract.**

   An agreement by a transportation company to furnish sufficient shipping facilities at a certain place for the shipment of a crop of watermelons to be raised by the shipper, the agreement being made before the crop was planted and in contemplation of favorable weather conditions, is too indefinite and uncertain to be a valid and enforceable contract, and the alleged contract, tending to create a special advantage to a particular shipper, would also be invalid for that reason.

2. **Same—Failure of shipper to give the written request for service in accordance with the rule constituting part of tariff will bar recovery.**

   Where the shipper of a crop of watermelons in interstate commerce brings action against the carrier for failure to provide sufficient and accessible cars and reasonably adequate loading facilities for transporting part of the crop to the market, resulting in the loss thereof: *Held,* the carrier having filed its tariff on goods to be transported with the Interstate Commerce Commission, the failure of the shipper to give the written request, required by the rule constituting a part of the tariff, as to the type and character of the service desired, will prevent his recovery in the action, and although reasonable accessibility of cars furnished is contemplated in the term "transportation," as defined by the Federal Transportation Act, the machinery of the act is put into operation by the giving of the written request for such service required by the rule.

Civil action, before *Sinclair, J.,* at October Term, 1929, of Cumberland.

The plaintiff alleged and offered evidence tending to show that he was a farmer living near Wade, North Carolina, and during the season of 1928 planted about twenty acres in watermelons; that said watermelons were handled by his agent, David McNeill; that on 19 April, 1928, said

McNeill, acting for and in behalf of plaintiff and as his agent, wrote a letter to G. B. McClellan, division superintendent of the defendant at Rocky Mount, North Carolina. The letter is as follows: "Under favorable weather conditions for growing crops this season, I expect to handle from Wade anywhere from three to four hundred carloads of watermelons. And at present time we have only enough siding to load about twelve cars at a time. In the rush of the season, I cannot see where less than forty to sixty cars will be loaded here daily and ready for movement the second day. Last season I had carload after carload piled upon the ground for the sun to bake, which hurt the sale considerably, and had no room for cars to put them in. This year I am kindly asking you to investigate and make proper arrangements for the handling of these melons. The matter has already been taken up with your agent, Mr. Starling, and he advises that some action will be taken immediately. But the question I want to impress upon your mind is the necessity of plenty room for the placing of cars. Your coöperation in this matter will be highly appreciated, and in return for your kindness I will be glad at any time to send you, or any of your force, at your request or theirs, a nice, sweet, juicy watermelon grown on the rich loamy soil of the Old North State, and agreeable to the most delicate stomach. Thanking you in advance, I am, yours respect."

The superintendent replied on 25 April as follows: "Acknowledging your favor of 20 April having reference to the prospective movement of watermelons from Wade, N. C., this season. I will have this matter looked into and necessary arrangements will be made to take care of your needs." Plaintiff further offered evidence tending to show that he had for shipment to J. Earl Roberts, a wholesale fruit and vegetable merchant doing business in the city of Philadelphia, Pa., eight or nine carloads of watermelons, and of this quantity he was able to ship only five cars, and that he was unable to ship three cars of said melons which resulted in a total loss thereof, amounting to $473.

The original complaint alleged that "not enough space was provided on its sidetrack and pass track on which to place empty cars enough accessible for loading in which to load and ship said melons, nor were the facilities provided such as defendant had expressly promised plaintiff to provide." The plaintiff amended the complaint, alleging "that there were at all times during said shipping season sufficient empty cars on the defendant's pass track at Wade, N. C., in which to load all watermelons raised by the plaintiff and tendered by him to the defendant for transportation at its regular station in Wade, N. C., as aforestated, but said empty cars were placed on defendant's pass track below the point to where the aforementioned borrow pit or ditch had been filled in, making them utterly inaccessible for loading."

Plaintiff's agent testified: "There was at no time any shortage of cars to be loaded. My only claim is that there was no place to put them on. . . . I never at any time requested Mr. Starling, the agent, in writing, to place cars for me at any particular time. I never gave him written orders for any cars at any time."

The three cars of melons for which plaintiff institutes this action were piled in the field and were never transported to the defendant's tracks at Wade, N. C., nor were they otherwise tendered for shipment. The plaintiff testified: "The reason I did not take any over there Wednesday and Thursday is because I wanted to be sure there was something I could put them in. . . . The reason I failed to ship them I could not get cars to ship them in. . . . I did not at any time ask Mr. Starling, the agent at Wade, to place any cars for me, and I made no request of the agent either orally or in writing to place any cars for me."

At the conclusion of the evidence the plaintiff admitted in open court that he "did not tender any loaded cars to defendant which were refused."

The defendant offered evidence tending to show that the facilities at Wade, N. C., which is a small station on defendant's line, were wholly adequate to meet the needs of all shippers, and that at all times a sufficient number of cars were available and accessible to plaintiff and others.

The following issues were submitted to the jury:

1. "Did the defendant, Atlantic Coast Line Railroad Company, contract and agree with the plaintiff, D. O. McLemore, to furnish to him sufficient sidetrack and shipping facilities for loading his watermelons at Wade, N. C., during the shipping season of 1928?"

2. "Did the defendant negligently fail to provide means and facilities at its station in Wade, N. C., reasonably necessary for receiving and transporting all watermelons offered it for shipment by plaintiff and others during the season of 1928, as alleged in the complaint?"

3. "Did the plaintiff, during said season, offer to the defendant for shipment to J. Earle Roberts watermelons sufficient to load three cars, as alleged, and if so, did the defendant negligently fail to provide shipping facilities reasonably necessary for the loading and transportation of said watermelons, as alleged?"

4. "Did the plaintiff, D. O. McLemore, at any time during the watermelon shipping season of 1928, file with the agent of the Atlantic Coast Line Railroad Company at Wade, N. C., written request for the placing of freight cars to be used by him in shipping watermelons?"

5. "What damages, if any, is the plaintiff, D. O. McLemore, entitled to recover of the defendant, Atlantic Coast Line Railroad Company,

proximately resulting from the alleged failure to receive and transport the carload shipments of watermelons tendered to the defendant for shipment, if any?"

The jury answered the first issue "yes," the second issue "yes," the third issue "yes," the fourth issue "no," and the fifth issue "$300."

From judgment upon the verdict the defendant appealed.

S. C. McPhail and Nimocks & Nimocks for plaintiff.
W. A. Townes and Rose & Lyon for defendant.

Brogden, J. What duty does a common carrier owe under the Federal Transportation Act to a shipper with reference to cars and loading facilities?

The watermelons which the plaintiff shipped were transported from Wade, North Carolina, to Philadelphia, Pa. Such shipment constituted interstate commerce. The melons which plaintiff proposed to ship were also intended to be transported to the same point. The Federal Transportation Act, paragraph 1, subsection 2, U. S. C. A., page 52, imposes upon every common carrier "engaged in the transportation . . . of property to provide and furnish such transportation upon reasonable request therefor." The words "transportation" as used in the act includes not only cars and other vehicles, but "all instrumentalities and facilities of shipment or carriage . . . and all services in connection with the receipt, delivery, elevation, and handling of property transported."

The record discloses that the defendant had filed with the Interstate Commerce Commission certain tariffs applicable to shipments in interstate commerce moving on the lines of defendant in July and August, 1928. Rule No. 35-D was offered in evidence and is as follows: "Orders for cars desired for loading must be filed, with reasonable advance notice, by shippers with the originating carrier's agent and must be given in writing (or if given orally or by telephone must be confirmed in writing) and must specify the type of car (refrigerator, ventilator, box, etc.), and character of carrier's service desired. (See Rules Nos. 80-H and 87-B.)" Rule 27, section 1, was also offered in evidence and provides that "owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings."

The rule requiring notice in writing is a part of the tariff and cannot be waived. *James C. Davis v. Geo. D. Henderson,* 266 U. S., 92, 69 L. Ed., 182; *Falmouth Coöp. Marketing Assn. v. Penn R. R. Co.,* 212 N. W., 84.

The plaintiff bases his cause of action upon three theories: First, that the letter of 20 April, 1928, to Superintendent McClellan and the reply thereto constituted a valid contract for increasing shipping facilities at Wade, N. C. Second, that sufficient cars were not available for moving the property of plaintiff. Third, conceding that a sufficient number of cars were furnished, the cars so furnished were inaccessible by reason of soft, miry and defective approaches thereto.

The first theory is untenable. The letter of 20 April, 1928, contemplated "favorable weather conditions for growing crops this season," and was written before the crop was planted. The experience of mankind through centuries of fair weather and foul has amply demonstrated that the hope of the planting is not always the fact of the harvesting. Hence the letter and reply thereto do not measure up to the dignity of a valid and enforceable contract. Moreover any contract, tending to create a special advantage for a particular shipper, when not within the published tariff, is invalid. *Davis v. Cornwell,* 264 U. S., 563, 68 L. Ed., 848; *Chicago & Alton R. R. Co. v. Kirby,* 225 U. S., 155, 56 L. Ed., 1033.

Neither can the plaintiff recover upon the second theory for the reason that no request in writing was duly filed as required by Rule 35-D. *Davis v. Henderson, supra.*

Nor can the plaintiff recover upon the third theory. Undoubtedly it is the duty of the carrier to furnish reasonable transportation facilities, and this must include reasonable facilities for loading cars for shipment. The furnishing of cars at an inaccessible place or at a place where a shipper could not reasonably have access to them would not comply either with reason or the requirements of the law. Certainly, reasonable accessibility to cars furnished, is contemplated within the term "transportation" as defined by the Federal Transportation Act. However, the machinery of the transportation act is put into operation by the "reasonable requests therefor." Manifestly the carrier is entitled to know the specific demands of the shipper and the time when the need for equipment arises in order that a reasonable opportunity be afforded to promptly supply the need without crippling the service or creating special advantages or discriminations. Beyond the letter of 20 April, 1928, there is no notice whatever to the defendant as to the needs of plaintiff or others, and no indication whatever to defendant as to the type and extent of service required at Wade, North Carolina; nor is there any notice in writing that the cars furnished were inaccessible by reason of defective approaches thereto.

We therefore hold upon the record as presented that the motion for nonsuit should have been allowed.

Reversed.

MRS. ADDIE JOLLEY v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 20 August, 1930.)

1. **Insurance E b—Where meaning of policy of insurance is ambiguous contract should be construed against insurer.**

Where the meaning of the language of a policy of insurance is ambiguous all doubt should be construed against the insurer, but where the terms of the policy are free from uncertainty there is no necessity for construction, and it is the duty of the courts to enforce such contracts as they are written unless fraud, public policy, or maintainable equities should intervene.

2. **Same—Incontestable clause does not prevent insurer from showing that risk causing death was not covered by policy.**

Where the double indemnity clause of a policy of life insurance expressly and clearly excludes from the operation of the clause death resulting from bodily injury inflicted by a third person, the incontestable clause of the policy does not operate to increase the risks covered therein, and the beneficiary of such policy cannot maintain that the incontestable clause withdraws from the insurer the right to contest the payment of the double indemnity, the effect of the incontestable clause being to preclude the insurer from questioning the validity of the contract at its inception, and to prevent it from maintaining that the policy thereafter became invalid by reason of a condition broken.

CIVIL ACTION, before *Devin, J.*, at September Term, 1929, of MARTIN.

On 15 April, 1919, the defendant issued to Joseph Henry Jolley a policy of life insurance. Thereafter on 26 May, 1929, plaintiff's intestate, "while sitting in the hall of his home and through no fault of his own, and being sane and sober, and being engaged in no fight, affray or other unlawful enterprise, was intentionally shot from ambush by some person, alleged to have been one Frank Cox." There has been no default in the payment of any premium and no waiver of any premium on account of disability and the insured had never engaged in military or naval service or any allied branch thereof. The said policy of insurance obligated to pay $2,500 to the insured's estate upon due proof of death.

The policy also contained the following double indemnity clause: "The company will pay the beneficiary in full settlement of all claims hereunder double the face amount of this policy, if during the premium-paying period, and before default in the payment of any premium, and before waiver of any premium on account of disability, and before any non-forfeiture provision is in effect, the death of the insured results from bodily injury within ninety days after the occurrence of such injury, provided death results directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means while the insured is sane and sober; except these provisions do not apply if the insured shall engage in military or naval service, or any allied branch thereof, in time of war, or in case death results from bodily injuries inflicted by another person or by the insured himself, or in case of self-destruction." Under the head of "General Provisions" occurs the following incontestable clause: "After one year from date this policy shall be incontestable for any cause except for nonpayment of premiums and violation of the provisions relating to military or naval service or any allied branch thereof in time of war, when the Double Indemnity and Total and Permanent Disability provisions shall not apply."

The defendant paid the plaintiff, administratrix of the insured, the full face amount of said policy, to wit, $2,500, but declined to pay the sum of $2,500 claimed by plaintiff under the double indemnity clause.

The trial judge, being of the opinion that the plaintiff was not entitled to recover "any sum whatsoever on account of the double indemnity provisions of the policy," nonsuited the case, from which judgment plaintiff appealed.

Jos. W. Bailey for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

BROGDEN, J. Does the incontestable clause in the policy preclude the insurance company from asserting that the risk producing the death was not covered by the terms thereof?

Stated baldly, the proposition of law is this: Does the incontestable clause modify, extend or enlarge the coverage clause?

An examination of the provisions of the policy involved in this litigation discloses that the double indemnity clause by express terms does not cover accidental injuries resulting in death occasioned and brought about by (a) participation in military or naval service or any allied branch thereof in time of war; (b) bodily injury inflicted by another person upon the insured; (c) bodily injury inflicted by the insured himself; (d) self-destruction at any time whether during the first policy year or afterwards.

It is clear therefore that accidental death resulting from bodily injury inflicted by a third party is not a risk covered by the policy or assumed by the insurance company. The plaintiff, however, insists that the incontestable clause of the policy withdraws from the company any and all right to contest the payment of double indemnity unless it should appear that death resulted from participation in military or naval service or any allied branch thereof in time of war. Thus the effect of plaintiff's contention is that, while injury inflicted by a third person resulting in death is withdrawn in the double indemnity clause, such risk is written back into the policy by virtue of the application of the incontestable clause.

It is thoroughly established that if there should be doubt as to the true meaning of the language used in an insurance policy, such policy should be construed against the company, and all such doubts resolved against the insurer. *Crowell v. Ins. Co.,* 169 N. C., 35, 85 S. E., 37; *Allgood v. Insurance Co.,* 186 N. C., 415, 119 S. E., 561. Furthermore, "when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the Court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." *First National Bank of Kansas City v. Hartford Fire Ins. Co.,* 95 U. S., 673, 24 Law Ed., 563; *Underwood v. Ins. Co.,* 177 N. C., 327, 98 S. E., 832; *Poole v. Ins. Co.,* 188 N. C., 468, 125 S. E., 8. Notwithstanding, when the terms of the policy are free from uncertainty or ambiguity, there is no necessity for construction, and it is the plain duty of the Court to enforce such contracts as they are written unless fraud, considerations of public policy or maintainable equities should intervene. *Penn v. Ins. Co.,* 158 N. C., 29, 73 S. E., 99; *Gant v. Ins. Co.,* 197 N. C., 122, 147 S. E., 740.

The interpretation of incontestable clauses in insurance policies and the effect of such clauses upon other portions of the contract has produced sharp and wide divergence of judicial opinion.

The question was considered by this Court in *Trust Co. v. Ins. Co.,* 173 N. C., 558, 92 S. E., 706. The Court citing authorities, declared: "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision." But what does the expression "contesting the policy" mean, or what is essential to constitute a contest of the policy? The identical question was considered in *Scarborough v. Ins. Co.,* 171 N. C., 353, 88 S. E., 482. It is there written: "By the use of the term "incontestable" the parties must necessarily mean that the provisions of the policy will not be contested, and not that the insurance company agrees to waive the right to defend itself against a risk which it never contracted to assume." Quoting from *Collins v. Metropolitan Life Ins. Co.,* 27 Pa. Super. Ct., 345, the Court continued: "By its terms it is not the claim presented by the insured, irrespective of the cause of death, which is made incontestable; it is merely the validity of the policy as an obligation binding upon the company." The *Scarborough case* has been widely quoted by various courts in the country, notably *Hearin v. Standard Life Ins. Co.,* 8 Fed. 2d, 202; *Myers v. Liberty Life Ins. Co.,* 257 Pac., 933; *Fore v. N. Y. Life Ins. Co.,* 22 S. W., 2d, 401; *Metropolitan Life Insurance Co. v. Conway,* 169 N. E., 642; *Wright v. Philadelphia Life Ins. Co.,* 25 Fed. 2d., 514. The *Scarborough case* holds in effect that the incontestable clause has no application to a risk not assumed in the policy. This interpretation is amply supported by abundant authority. Thus in *Wright v. Philadelphia Life Ins. Co.,* 25 Fed., 2d, 514, the Court wrote: "The insurance company in this case is not denying in any way the validity of the contract, and therefore is not contesting the policy. Indeed, it stands upon the contract, affirms its validity, and says that, by the terms of the contract itself, the risk was not assumed." A clear and precise exposition of the legal proposition is written by *Cardozo, C. J.,* in *Metropolitan Life Ins. Co. v. Conway, supra.* The principle was thus expressed: "The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken. . . . Where there has been no assumption of risk there can be no liability."

That is to say, the application of the incontestable clause precludes an insurance company from questioning the validity of the contract in its inception, or that it thereafter became invalid by reason of a broken condition. Hence an ordinary incontestable clause cannot be used as a means of rewriting into the contract risks and hazards which the policy itself positively excluded. *Woodbury v. N. Y. Life Ins. Co.,* 221 N. Y. S., 357; *Sanders v. Jefferson Standard Life Ins. Co.,* 10 Fed., 2d, 143; *Scales v. Jefferson Standard,* 295 S. W., 58. A line up of the courts upon the question will appear in the annotation contained in 55 A. L. R., 549.

The plaintiff relies upon *Simpson v. Ins. Co.,* 115 N. C., 393, 20 S. E., 517; *Mareck v. Mutual Reserve,* 64 N. W., 68; *Northwestern Mutual Life Ins. Co. v. Johnson,* 254 U. S., 96, 65 Law Ed., 155. The *Mareck case* was referred to and distinguished in *Myers v. Liberty Ins. Co., supra.* The *Johnson case* was referred to and distinguished in *Metropolitan Life Ins. Co. v. Conway, supra.* The *Simpson case* contains implications which support the position taken by the plaintiff, but these implications are squarely met in the *Scarborough case, supra.* Moreover, the incontestable clause in the *Simpson case* was broad and comprehensive and extended far beyond the boundary of the clause under consideration in the case at bar. The language was: "Said policy shall from this date be incontestable, and when the policy becomes a claim the amount of insurance shall be paid immediately upon approval of proof of death." The plain meaning of this language is that when the policy becomes a claim, the total amount of insurance specified therein shall be paid, and an examination of the opinion discloses that the decision was based upon the words "claim" and "amount of insurance." Hence we do not consider the *Simpson case* a controlling authority upon the precise question presented by this appeal.

Affirmed.

GEORGE H. WARD v. TOWN OF WAYNESVILLE.

(Filed 20 August, 1930.)

1. **Eminent Domain C e—Measure of damages recoverable by owner for land taken in condemnation proceedings.**

   The measure of damages to be awarded the owner of lands for the taking of a part thereof by a town for widening a street is the difference in the fair market value of his land, before and after taking, less the value of special benefits to him.

2. **Same—Questions asked witnesses in proceedings to assess compensation held competent.**

   Where in proceedings against a town for compensation for lands taken by it in widening its streets, witnesses for the town have testified as to the value of the plaintiff's lands before and after the taking of a part thereof, but have not testified that plaintiff received any special benefits, it is proper for the plaintiff on cross-examination to ask them if they would give, after the taking, the amount of the plaintiff's proportionate part of the improvement assessments, both as impeaching their testimony and as ascertaining if they had considered the improvements to the street in forming an opinion as to the value of the land after the taking, and *held further*, error, if any, in the admission of the evidence was not prejudicial in view of the fact that the court expressly charged the jury that the street assessments could not be taken into consideration as an element of damages.

3. **Trial B f—Where evidence is admissible for restricted purpose objecting party should request instruction that it be so considered by jury.**

   Where evidence is properly admitted by the trial court for a restricted purpose, the objecting party should, at the time it is admitted, ask the court to instruct the jury that it be considered only for the purposes for which it is competent, and a general exception will not be sustained. Rules of Practice in the Supreme Court No. 21.

APPEAL by defendant from *Harwood, Special Judge,* at October Special Term, 1929, of HAYWOOD. No error.

This is a proceeding for the recovery of damages sustained by plaintiff, resulting from the taking and appropriation by defendant, a municipal corporation of this State, of a part of plaintiff's land, situate within the corporate limits of defendant, for the purpose of widening, constructing and improving certain streets of said corporation.

Defendant denied liability, and in its answer to the petition filed by plaintiff, alleged that plaintiff had received special benefits in excess of any damages he may have sustained, by reason of the widening, construction and improvement of said streets.

From an assessment of his damages, made by appraisers appointed by the board of aldermen of defendant corporation, in accordance with his petition, plaintiff appealed to the Superior Court of Haywood County. At October Special Term, 1929, of said court, when this appeal was called for trial, it was agreed by and between plaintiff and defendant that the proceeding and the appeal were regular in all respects and that the only issue to be submitted to the jury was as follows:

"What damages, if any, is the plaintiff entitled to recover of the defendant, the town of Waynesville, on account of the taking and appropriation of a part of plaintiff's land?"

After the introduction of evidence by both plaintiff and defendant, and after the charge of the court, the jury answered the issue: "$2,650."

From judgment in accordance with the verdict that plaintiff recover of the defendant the sum of $2,650, and the costs of the proceeding, the defendant appealed to the Supreme Court.

Alley & Alley and John Queen for plaintiff.
J. E. Johnson and Hannah & Hannah for defendant.

CONNOR, J. The defendant, the town of Waynesville, is a municipal corporation, organized and existing under and by virtue of the laws of this State. Plaintiff was in 1926, and is now, the owner of a parcel of land situate within the corporate limits of the defendant, and bounded by East Main and Hazel streets. In 1926 the defendant, pursuant to resolutions of its board of aldermen, took and appropriated a part of plaintiff's land for the purpose of widening, constructing and improving said streets. Plaintiff's land contained about two and one-third acres, and was valuable chiefly for division into lots for residential purposes. The part of said land taken and appropriated by defendant contains about 44/100 of an acre, and consists of a strip of land extending on East Main Street about 347 feet, and on Hazel Street about 291 feet.

Evidence offered by plaintiff tended to show that prior to said taking and appropriation, plaintiff's land was worth about $5,000 and that after said taking and appropriation it was worth not to exceed $1,500; that the value of said land for division into lots for residential purposes was greatly diminished as the result of the taking and appropriation of part of the same by defendant. Defendant, on its cross-examination of plaintiff's witnesses, who had testified as to the value of said land, both before and after the taking of a part of the same by the defendant, elicited evidence tending to show that said streets had been paved and greatly improved by defendant. This evidence was in support of defendant's contention that plaintiff had received benefits, both special and general, by reason of the widening, construction and improvement of said streets.

Witnesses offered by defendant testified that plaintiff's land before the taking and appropriation by defendant of part of same, was worth not to exceed $3,000, and that after said taking and appropriation, by reason of the improvement of said streets, it was worth at least $1,000 more than before said taking and appropriation. None of these witnesses testified, however, that plaintiff had received any special benefits by reason of the improvement of said streets. On cross-examination of these witnesses by the plaintiff, each was asked if he would give for said land, after the improvement of the streets, the amount assessed against it by the defendant, as plaintiff's proportional part of the cost of the improvements. There was evidence tending to show that the amount of the assessment was $3,592. Each witness answered, "No." In apt time, defendant objected to these questions, and excepted to the refusal of the court to sustain said objections. Defendant also moved that the answers to these questions be stricken from the record, and in apt time excepted to the refusal of the court to allow said motions. By assignments of error based upon these exceptions, defendant on its appeal to this Court, presents its contention that there was error both in the refusal of the court to sustain its objections to the questions addressed to the witnesses, and in its refusal to allow its motions that the answers of the witnesses to the question be stricken from the record. These assignments of error cannot be sustained. The questions were proper, both for the purpose of impeaching the witness, and for the purpose of ascertaining whether the witness had taken into consideration the improvements to the street in forming his opinion as to the value of the land after the taking and appropriation of a part of the same by defendant. Defendant did not request the court, at the time the evidence was admitted on cross-examination, or at any other time during the trial, to instruct the jury that the evidence was admitted for restricted purposes. Defendant contented itself with a general objection to the evidence. Its admission, therefore, cannot be assigned as error on defendant's appeal to this Court. If evidence is competent for restricted, but not for general purposes, in the absence of a request by appellant, at the time of its admission, that the court instruct the jury as to the purpose for which it was competent, its admission is not a ground of exception. Rule 21, Rules of the Supreme Court of North Carolina, 192 N. C., 850; *Roberson v. Stokes,* 181 N. C., 59, 106 S. E., 151. However, upon the record in the instant case, even if it be conceded that there was error in the refusal of the court to sustain defendant's objection to the questions, and in its refusal to allow defendant's motion that the answers to the questions be stricken from the record, we do not think the error in either respect was so prejudicial to defendant, as to entitle defendant to a new trial. The court expressly charged the jury that the street assessments made against plaintiff's land could not be taken into consideration as an element of damages.

In its charge, the court instructed the jury that "the measure of damages is the difference in the fair market value before and after taking, less the special benefits, if any. Any increase in value to the land enjoyed by others affected by the improvements is not a special benefit." This instruction is in accord with authoritative decisions of this Court. *Ayden v. Lancaster,* 197 N. C., 556, 150 S. E., 40; *Lanier v. Greenville,* 174 N. C., 311, 93 S. E., 850; *Campbell v. Commissioners,* 173 N. C., 500, 92 S. E., 323; *Elks v. Commissioners,* 179 N. C., 241, 102 S. E., 414; *Bost v. Cabarrus,* 152 N. C., 531, 67 S. E., 1066; *R. R. v. Platt Land,* 133 N. C., 266, 45 S. E., 589.

We find no error in the instructions to which defendant excepted and which it assigns as error. These instructions are founded upon the correct rule contained in the foregoing instruction, and are but variations of this rule, presenting the contentions of the parties as to the facts shown by the evidence. As we find no error, the judgment must be affirmed.

No error.

RILEY ORR v. WAYNE BEACHBOARD.

(Filed 20 August, 1930.)

Insane Persons I a—Court is without authority to appoint guardian ad litem for person after he has been cured of insanity.

Where a party to an action has become insane and placed in a State institution therefor, and is thereafter released therefrom as sane, C. S., 6214, the court is without authority, after his regaining his sanity, to appoint a guardian *ad litem* for him, C. S., 451, and notice to the guardian so appointed as to the taking of depositions of witnesses does not comply with the required statutory notice, C. S., 1810, and upon objection, the depositions so taken should be excluded.

CIVIL ACTION, before *Moore, J.*, at January Term, 1930, of GRAHAM.

The plaintiff instituted an action against the defendant alleging that the defendant had collected from him the sum of $400 to be paid to an auditor who was employed by the defendant to audit the plaintiff's accounts as sheriff and tax collector of Graham County. The defendant filed answer denying that he was indebted to the plaintiff, and alleged that the money paid him by plaintiff was in settlement of professional services. After the defendant's answer had been filed he was adjudged insane and committed to the State Hospital at Raleigh. The wife of defendant, Mary Beachboard, was duly appointed guardian of the defendant. An order was thereafter duly issued requiring Mary Beachboard, guardian, to appear and defend the action, but this order was returned with a notation to the effect that Mary Beachboard was not to be found in Buncombe County or North Carolina, and was said to be in New York City. At a subsequent term on 4 June, 1929, the plaintiff filed an affidavit in the cause to the effect that Mary Beachboard, guardian of the defendant, was in New York City and beyond the jurisdiction of the Superior Court of Buncombe County, and that there was no way to serve notice on said guardian to appear in court. Whereupon, the affiant asked the court to appoint a guardian *ad litem* for the defendant. Thereupon Judge McElroy appointed T. M. Jenkins guardian *ad litem* for said defendant. At the trial the plaintiff offered in evidence the deposition of Fred A. Hull. Counsel representing the defendant objected to the deposition upon the ground that no notice had been given defendant of the time and place for taking said deposition. The evidence tended to show that the only notice given of taking said deposition was that given to T. M. Jenkins, guardian *ad litem*, who was present at the taking of the deposition. It further appears that there "was read into the record" a certificate of Dr. Albert Anderson, superintendent of Dix Hill State Hospital, Raleigh, N. C., dated 11 May, 1929, as follows: "This is to certify that Wayne Beachboard, an insane person, was sent to this hospital from Buncombe County, and that, in my opinion, he having become of sane mind, has been discharged as cured, in accordance with the provisions of section 6214, Consolidated Statutes of 1919." Hence at the time the guardian *ad litem* was appointed for the defendant and at the time the deposition was taken the defendant had been discharged from the hospital for the insane in accordance with the provisions of C. S., 6214.

There was judgment for the plaintiff and the defendant appealed.

R. L. Phillips for plaintiff.

Calvin R. Edney, S. J. Pegram and James E. Rector for defendant.

BROGDEN, J. Can a guardian *ad litem* be appointed for a sane person, and is the act of such guardian *ad litem* in conducting litigation for such person binding?

The plaintiff instituted an action against the defendant alleging a misappropriation of money. The defendant filed an answer denying the allegations of the complaint. Thereafter the defendant was adjudged insane and confined in the State Hospital at Raleigh. His wife was duly appointed his general guardian. On 11 May, 1929, the defendant was discharged from the hospital in accordance with C. S., 6214, upon the ground that he was then of sane mind. Subsequently, in June, 1929, without notice to the defendant or his general guardian, and without having the general guardian removed as provided in C. S., 2158, the court proceeded to appoint a guardian *ad litem* to defend the action for and in behalf of defendant. The guardian *ad litem* so appointed undertook to accept service of notice of the taking of deposition and appeared at the taking of said deposition, said deposition being taken at the instance of plaintiff. C. S., 451, empowers the court to appoint a guardian *ad litem* for infants, idiots, lunatics, or persons *non compos mentis*. Therefore, at the time the guardian *ad litem* was appointed the defendant did not fall within the classification provided in the statute, and there was no authority or warrant of law for such appointment. C. S., 1810, requires notice to take deposition to be "served upon the adverse party or his attorney" by the party at whose instance such deposition is taken. The case at bar discloses that no such notice was given and the deposition objected to in apt time should have been excluded from consideration by the jury.

A motion to dismiss the appeal was lodged by the plaintiff, but it appears that certain stipulations of counsel attached to the record preclude the granting of such motion.

New trial.

STATE v. FRED ERWIN BEAL, W. M. McGINNIS, LOUIS McLAUGHLIN, GEORGE CARTER, JOSEPH HARRISON, K. Y. HENDRICKS AND CLARENCE MILLER.

(Filed 20 August, 1930.)

1. **Homicide B b—In this case held: evidence of defendant's guilt of murder resulting from an unlawful conspiracy held sufficient.**

Where upon a trial for murder there is evidence tending to show that the defendants, leaders of a strike, had conspired and unlawfully agreed among themselves to resist officers of the law to the death and shoot to kill in case their plans were interrupted, and that they had made threats against the officers and had gathered ammunition and guns at their union headquarters and had placed armed guards about the place, and that when officers arrested one of the guards and were taking him from the grounds of the union headquarters to the patrol wagon a number of shots were fired, wounding the union guard who had been arrested and each of the officers, one of them fatally, and that none of the strikers were wounded except the one arrested, and that empty shells were found in the union headquarters, with further evidence that the defendants had taken active part in forming the conspiracy and had participated in the actual shooting; with other evidence of defendants' guilt: *Held*, the evidence was sufficient to be submitted to the jury, and defendants' motion as of nonsuit was properly refused.

2. **Criminal Law I j—Upon motion as of nonsuit the evidence is to be taken in the light most favorable to the State.**

Upon motion as of nonsuit in a criminal prosecution the evidence is to be considered in the light most favorable to the State, and if there be any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt.

3. **Criminal Law G g—Flight of one of conspirators immediately after murder held competent circumstance to be considered by jury.**

Where in a conspiracy of strikers to resist officers of the law to the death and shoot to kill if their plans were interfered with, resulting in the death of an officer, the fact that one of the strike leaders immediately departed from the community after the murder is a competent circumstance to be considered by the jury with other evidence in the case.

4. **Criminal Law G a—Failure of defendant to testify in his own behalf raises no presumption against him.**

The failure of a defendant to testify in his own behalf does not raise any presumption against him, and is not a proper subject of comment by the solicitor in his argument to the jury, though his failure to testify necessarily leaves the jury to infer the facts without the benefit of any statement from him.

5. **Criminal Law G k—Acts and declaration of a conspirator are admissible in evidence against co-conspirators.**

Where the State makes out a prima facie case of conspiracy to commit an unlawful act, the acts and declarations of each one of the alleged conspirators done or uttered in furtherance of the common design, are admissible in evidence against them all.

6. **Criminal Law C a—Persons present and aiding and abetting in commission of crime are guilty as principals.**

Where a number of persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty.

7. **Indictment C a—Bill of particulars is not subject to demurrer.**

A bill of particulars filed by order of court in a criminal action is not regarded as a part of the indictment, and with the court's permission may be amended at any time, and is not subject to demurrer, the office of such bill being to advise the court and the accused of specific occurrences for investigation. C. S., 4613.

8. **Indictment C b—Motion to quash for duplicity made after pleading is addressed to discretion of court.**

A motion to quash for duplicity and indefiniteness made after pleas of not guilty is addressed to the sound discretion of the trial judge and is not allowable as a matter of right.

9. **Criminal Law J b—Court may order mistrial of necessity where one of jurors becomes insane during course of trial.**

The trial judge has the power to order a mistrial in criminal cases as a matter of necessity where one of the jurors becomes insane during the course of the trial, but in capital cases he must find the facts for review, and where the court has ordered a mistrial upon a proper finding of fact, the court has the power, upon learning that one of the defendants had voluntarily absented himself from the court room at the time the mistrial was ordered, to strike out the order of recess and repeat the proceedings in the presence of all the defendants.

10. **Criminal Law F a—Plea of former jeopardy will not be sustained where mistrial was properly ordered.**

Where in a criminal prosecution a mistrial is properly ordered, defendants' subsequent plea of former jeopardy cannot be sustained.

11. **Homicide G c—In this case held: dying declarations of deceased were competent.**

Declarations made by the deceased while sane, in *articulo mortis* or *in extremis*, in apprehension of approaching death, concerning the killing or matters going to make up a part of the *res gestæ*, are competent evidence upon the trial of the defendants for a conspiracy resulting in murder, and such declarations are not made incompetent as expressions of opinion from the fact that the defendants were not specifically mentioned, when it appears with certainty that they were the ones referred to; as in this case, "I do not know why they shot me in the back and killed me. I didn't do anything."

12. **Criminal Law G r—In this case held: questions asked defendant on cross-examination were competent.**

Where the evidence under an indictment for conspiracy by strikers to resist officers of the law to the death if their plans were interfered with, resulting in the killing of one of the officers, it is competent for the State in cross-examining one of the defendants, a representative of the union conducting the strike, as to his circulating locally a Communist paper containing several communications adversely criticizing the police officers, the defendant having previously testified without objection to a letter written by him and published in the said paper.

13. **Criminal Law L e—In this case held: questions asked witness on cross-examination did not prejudice defendants.**

Where a witness had not been challenged upon her *voir dire* to test her competency to testify as a witness, and has been sworn to speak the truth as required by C. S., 3189, 3190, 3191, questions asked her upon cross-examination by the solicitor as to her religious beliefs for the purpose of impeaching her credibility, if error, will not be held prejudicial or harmful when the answers of the witness, taken in connection with her previous testimony, do not show that she intended to express a disqualifying disbelief, it appearing that no appreciable harm has come to the defendants, if harm at all, and the verdict and judgment will not be disturbed upon defendants' exceptions to the questions. The change in the Constitution on the subject observed and discussed by STACY, C. J., but effect not determined.

14. Same—Alleged error upon the trial must be prejudicial to defendant in order to entitle him to a new trial.

In order for an award of a new trial on appeal for alleged erroneous admission of evidence upon the trial, the appellant must show error positive and tangible that has affected his rights substantially and not merely theoretically, *e. g.*, that a different result would have likely ensued.

15. Criminal Law L d—Exception to exclusion of testimony of witness in this case held not presented for review upon the record.

An exception to the exclusion of testimony of a witness offered as a sustaining witness to a character witness is not properly presented for review on appeal when it is not made to appear of record that the witness would have qualified and given the evidence suggested.

16. Criminal Law G j—Instruction as to scrutiny which should be given defendants' testimony held not erroneous.

Where the defendants in a criminal prosecution testify in their own behalf, an instruction that their testimony should be scrutinized with care to ascertain to what extent, if any, it was warped or biased by their interest, and that should the jury then believe them their testimony should be given the same credit as if they were disinterested, is free from error.

17. Error in trial for lesser degrees of crime is immaterial where sentence for greater degree is longer and sentences are to run concurrently.

Where indictments charging conspiracy to commit a homicide resulting in murder and lesser degrees of the crime have been consolidated without objection of the defendants, upon the motion of defendants in arrest of judgment on the ground that they were not required to plead to the bill charging the various lesser degrees of the offense, it may be said that the plea of not guilty to the bill charging the greatest offense applied to any and all offenses subsequently added thereto, without objection, relating to the same transaction, but the conviction of the defendants of the greatest degree of the crime is not challenged by the motion in arrest, and the sentence for the greatest degree being longer than the combined sentences for the lesser degrees, and the sentences running concurrently, error committed with respect to the lesser degrees would not affect the verdict and judgment on conviction of the greatest degree.

18. Criminal Law J b—Motion for new trial for improper argument of solicitor is addressed to discretion of court.

A motion to set aside the verdict and for a new trial on the ground of alleged prejudicial appeals by the solicitor in his argument to the jury is addressed to the sound discretion of the trial court which will not be reviewed on appeal unless the impropriety of counsel be gross and calculated to prejudice the jury, and where the record discloses that the court promptly stopped the solicitor on objection of defendants, and at one time of its own motion directed the solicitor to stay within the record, and there is nothing in the record to show the character of the argument or that the judge failed to do his full duty, the refusal of the motion by the court will not be held for error.

APPEAL by defendants from *Barnhill, J.*, at September Special Term, 1929, of MECKLENBURG.

Criminal prosecution tried upon indictments charging the defendants, pursuant to an unlawful conspiracy or confederation, with (1) the murder of O. F. Aderholt; (2) felonious secret assault upon T. A. Gilbert; (3) felonious secret assault upon A. J. Roach, and (4) felonious secret assault upon C. M. Ferguson.

STATEMENT OF THE CASE.

The case grows out of a strike begun 1 April, 1929, and conducted by the local branch of the National Textile Workers Union at the Manville-Jenkes Company's Loray Mill in Gastonia, North Carolina. Headquarters of the union were first established on West Franklin Avenue, and a few doors away the Workers International Relief, an organization designed to care for strikers and their families, had its headquarters. These union and relief headquarters were demolished on the night of 18 April by persons unknown, or at least not disclosed by the record. Members of the union then proceeded to construct new headquarters on North Loray Street on a lot leased for the purpose by the National Textile Workers Union. Here they erected a hall and a number of tents for storing supplies and housing strikers and their families.

Fearing a repetition of what had happened to their headquarters on Franklin Avenue, and not being willing to trust to the protection of the "one-sided Manville-Jenkes law," as was stated in a letter to Governor Gardner by a member of the strike committee, under date of 16 May (written with the approval of the defendant Beal), the strikers and members of the union supplied themselves with firearms, shotguns, pistols, etc., established a voluntary system of patrol, and, in this way, "determined to defend the new union headquarters at all costs." Holes were cut in the front wall of the building through which guns could be fired without disclosing the identity of the gunners to any one on the outside.

Meetings were held in the front yard of the premises from time to time, in fact nearly every evening, at which the progress of the strike and the condition of the workers were discussed by different speakers, and after the close of the meetings five or six guards, armed with shotguns, usually remained to patrol the property.

The evidence tends to show that, at one of the meetings, probably during the latter part of May, the defendant Beal, in an address to the workers, advised them that they were going to "pull a strike" at the Loray Mill; that he had sent a delegation to Washington to straighten the matter out with the government; that the bosses, thugs from the mill, and officers of the town were trying to tear up their union and break up their meetings, but "they were a fighting union—not dreading the police at all—let them come when they wish"—that he had instructed the guards to be constantly on the alert and to protect everything against all comers, police, mill thugs or bosses; and that the only way to win the strike was to shut down the Loray Mill.

On the night of 7 June, 1929, an encounter took place between police officers of the city of Gastonia and those in charge of the union premises, which resulted in the killing of O. F. Aderholt, chief of police, the wounding of officers Gilbert and Ferguson, and A. J. Roach who came with the police, and Joseph Harrison, one of the strikers.

Of the seven defendants tried and convicted, three came to Gastonia in connection with the strike, Fred Erwin Beal (age 33) of Lawrence, Mass., as Southern organizer for the National Textile Workers Union; Clarence Miller, of New York, as organizer of the Youth's Section of the union, with his wife (age 20), who organized the Children's Section, and George Carter (age 23), of Mispah, N. J., who read about the strike and came because he was interested in strikes. The remaining four, W. M. McGinnis, Louis McLaughlin, Joseph Harrison and K. Y. Hendricks (age 24), are residents of Gastonia.

True bills were returned by the grand jury of Gaston County against the defendants and nine others, and, at the instance of those indicted, the cases were removed to Mecklenburg County for trial.

August Special Term, Mecklenburg Superior Court, Barnhill, J., Presiding.

At the request of counsel for the defendants and under instruction from the court, a bill of particulars was filed by the solicitor, to which the defendants demurred. This was overruled, but on suggestion from the court, the solicitor filed an additional bill of particulars, detailing facts tending to show a conspiracy on the part of the defendants to resist the officers and to prevent their entry on the union grounds upon which the State expected to rely for a conviction on the charge of murder. The defendants again demurred on the ground of duplicity in the bill and indefiniteness in the charge; overruled; exception.

All sixteen of the original defendants were then put on trial (presumably for the capital offense) under the indictment charging them with the murder of O. F. Aderholt. During the progress of this trial, and after a number of witnesses had been examined, one of the jurors suffered an acute attack of emotional insanity and became wholly incapacitated for further jury service; whereupon on Monday, 9 September, 1929, about the hour of 10 a.m., the court, as a matter of necessity, withdrew a juror and ordered a mistrial, remanded the defendants to the custody of the sheriff, continued the cause, and took a recess until 2:30 p.m. The defendants thereupon moved for their discharge; overruled; exception.

After entering the above order and before leaving the bench, but after the jury had been discharged, the court discovered that one of the defendants was not present in court when the order of mistrial was entered, whereupon the absent defendant was sent for and after learning that he was ill and had left the court room at his own request, in the custody of the sheriff, the court at 11 a.m. directed the clerk to strike out the entry, "recessed until 2:30," and in the presence of all the defendants, the entire proceedings of the day were repeated, except the defendants declined to renew their motions. Objection to this procedure; overruled; exception.

September Special Term, Mecklenburg Superior Court, Barnhill, J., Presiding.

The defendants were again placed on trial at a special term of court which convened 30 September, 1929. Immediately after the opening of court the defendants, and each of them, moved for their discharge upon the ground that they had once been put in jeopardy and ought not to be tried again on the same indictment; overruled; exception.

Announcement having been made in open court that the State would not ask for a first degree verdict on the murder charge, but for a verdict of second degree only, or manslaughter, as the evidence might disclose, the solicitor moved that the four bills of indictment be consolidated and tried as different counts in a single indictment, which motion was allowed (without objection so far as appears from the record proper); whereupon a *nol. pros.* with leave was taken as to all the defendants, save the seven above mentioned who were ruled to trial over their renewed objections.

THE EVIDENCE.

On the evening of 7 June, 1929, a largely attended meeting was held on the union grounds. The gathering was addressed by Paul Shepherd, Vera Bush and the defendant Beal, each in turn speaking from a platform in front of the building provided for the purpose. Although the strike had been in progress for a month or more, seven or eight hundred employees were still working in the Loray Mill, and it was the intention of the strikers to form a picket line and march to the mill that evening. Plans for the march were discussed by the speakers, and some of their remarks were quite extreme. A disturbance occurred while Vera Bush or Fred Beal was speaking, occasioned by someone throwing eggs or missiles at the speaker, followed by an effort on the part of some of the strikers to eject the intruder from the premises, during which a shot was fired by some unidentified person and several blows were struck. This created quite a bit of excitement and looked at first as if a riot might ensue, though no great harm resulted from it.

After the speaking, the picket line was formed and started towards the mill, but this was stopped and turned back by the police at the railroad crossing near Franklin Avenue—peaceably and by simple requests according to the testimony of the police; forcibly and by brutal assaults according to the evidence of the picketers. As the picket line, which never reached the mill, was returning between 9:00 and 9:30 p.m., Mrs. Walter Grigg telephoned police headquarters and said: "If we ever need your protection, we need it now on North Loray Street." In consequence of this call, four policemen, Chief Aderholt, Gilbert, Ferguson, Adam Hord, and with them A. J. Roach, got into a city car, a Ford sedan, and drove to the union headquarters.

The attitude of the crowd towards the officers as they arrived, including those in charge of the union premises, was other than sympathetic, if not actually threatening. A number of guards with shotguns were patrolling the grounds—some stationed within the building and others on the lot outside. As the officers came up and started upon the premises, some girls from across the street were heard to cry out and say, "Do your duty, guards! Do your duty!"

There is evidence tending to show that Aderholt and Gilbert, followed by Roach, were the first to enter upon the union lot. They approached one of the guards—either Harrison or Carter—who was asked by Aderholt: "What is the trouble here?" and received the reply: "It is none of your damn business." The guard then drew his gun upon Gilbert, who grabbed the gun and succeeded in taking it from him; whereupon the chief remonstrated with the guard, saying: "You ought not to draw a gun on an officer for nothing," and told Gilbert to put him under arrest for an assault in drawing his gun, which Gilbert did.

The evidence of George Carter is to the effect that he was the guard in question and that, as the officers approached, he walked over to meet them and asked Gilbert, who was in the lead, if he had a warrant, to which Gilbert answered: "I don't need any G— d— warrant." The witness further testified that Gilbert then flashed a pistol in his face and grabbed his gun, taking hold of the barrel with his left hand. The State contends that Joseph Harrison was the guard first approached.

But passing for the moment this particular dispute, the evidence further tends to show that, leaving Gilbert and the guard (Harrison or Carter) where they had met near the front of the yard, Aderholt and Roach proceeded in the direction of the union hall, the former going to the back and the latter to the front of the building. Roach testified that he met a guard near the door, asked him what the trouble was, and received the reply, "None of your damn business." He told the guard to put up his gun, when some woman at the front hollered out, "You will find out whether they will shoot or not." On reaching the front door and looking inside, Roach said he saw four men, one of whom he recognized as the defendant Beal, with shotguns leveled towards him. Just at this time Chief Aderholt came from around the building and instructed Roach not to go inside. Aderholt and Roach then turned and rejoined Gilbert who was still in the front yard with the guard whom he had in custody.

As the three officers started away with the guard whom Gilbert had under arrest, there were shouts from outside as well as inside the building of, "Turn him loose!" and "Shoot them! shoot, shoot!" followed immediately by a shot which came from the direction of the building, then two more shots were heard, then a volley of 15 or 20.

When the smoke cleared away, it was discovered that Aderholt, Gilbert and Roach had been shot down, the first mortally, and the last two seriously, wounded. Joseph Harrison (who, according to the State's evidence, was in the custody of Gilbert at the time) was also wounded, as well as Ferguson, who remained near the automobile from the time the officers arrived on the scene.

It was the theory of the defendants that the injured officers were victims of their own guns, and to this end quite a bit of evidence was offered tending to show ill will or displeasure on the part of some towards the strikers, coupled with alleged threats to destroy the union headquarters and to break up the meetings held there; also, that Gilbert and Roach had been drinking on the afternoon and evening of 7 June (but this was strenuously denied, if not satisfactorily rebutted); and further that at the time the picket line was dispersed, Gilbert is alleged to have said to a fellow officer: "Let's go down there and kill the whole damn bunch of s— o— b—s. We had as well do it now as later."

On the other hand, the State alleged and offered evidence tending to show that the strikers had conspired to enter the Loray Mill on the evening in question and to remove therefrom, forcibly or otherwise, the employees engaged in their work; and had purposed to resist to the death the officers of the law, should they interfere with their plans or come upon the union grounds. The view of the prosecution prevailed with the jury. That of the defense was rejected.

What part, then, if any, did each of the defendants take in this unfortunate tragedy, as disclosed by the State's case? For present purposes, the inculpatory evidence only need be stated, as the defendants have challenged its sufficiency by separate demurrers or motions to nonsuit under C. S., 4643. The exculpatory evidence, offered by the defendants, was not accepted by the jury. Indeed, the cross-examination of the defendants' witness, Paul Shepherd, gives strong corroborating support to much of the State's case.

FRED ERWIN BEAL.

The evidence tends to show that the defendant Beal had participated in a number of strikes, in the New England States, before coming to Charlotte in December, 1928, as Southern organizer and representative of the National Textile Workers Union—an organization which he helped to form of various unions during the previous September—that he went to Gastonia and organized a local branch of the union in March, 1929; and that on 1 April following, a strike was called at the Loray Mill. In addition to the advice which he is alleged to have given in a speech during the latter part of May, heretofore mentioned, his address at the union headquarters on the evening of 7 June (delivered apparently after the disturbance occasioned by the egg-throwing) brings him closer to the tragedy, as witness the following extracts, detailed by a number of witnesses:

"We are going to have the biggest strike we have ever had. . . . Go, fellow-workers, go . . . Go to the mill and drag them out." (R., pp. 63 and 71.) "Form a picket line, go to the mill and go inside the mill, and if anybody bothers them shoot, and shoot to kill." (R., p. 124.) "Mill thugs and policemen, dirty devils, get them down and beat hell out of them. Shoot and shoot to kill." (R., p. 95.) "The mill thugs and stool pigeons have come down here to raise trouble, and we are not going to have it. I want the guards to arrest any one that they catch doing anything around here that they ought not to, and bring them to me, and what I will do won't be good for them." (R., p. 42.)

O. L. Glymph testified: "Beal said the time had come to form a picket line and go to the mill and drag them out. That they would never win the strike unless they shut the mill down. Said, if they had to fight they could fight, and if it took bloodshed they could shed it; that they had done that before."

Otto Mason testified: "McGinnis fired the first shot. He was about six feet from the south corner of the union building, facing the street in front. To the best of my knowledge Beal is the man who hollered, 'Shoot him!' " (R., p. 50.)

J. Robert Holly testified: "I heard Beal, in several speeches, refer to the police. He called them 'tin-star deputies.' He said they didn't have any right to shoot and wouldn't shoot, and begged them to go ahead and form a picket line. . . . They kept the guns and ammunition in the inner office of the union hall. I don't know exactly how many guns they had there, but approximately seven or eight shotguns and I think, one pistol."

A. J. Roach testified that as he approached the front door of the union hall he recognized the defendant Beal as one of the men with a shotgun leveled at him.

Beal himself testified that he was inside the inner office of the union building when the shooting occurred; that he took Joe Harrison to the hospital—went from there to his rooming house—caught a taxi in the center of town and drove to Charlotte—spent the night in Charlotte and left next morning for Spartanburg, S. C., going by way of Pineville and Rock Hill, rather than drive through Gastonia—was arrested in Spartanburg and brought back to North Carolina.

W. M. McGINNIS.

It is in evidence that about three weeks prior to the shooting, the defendant McGinnis told Will Grady that he was one of the union guards, and is quoted as saying: "We have got plenty of guns and ammunition and men that knows how to use them, and the first damn officer that comes up there, that ain't got no business there, chances are he will be carried out."

On the night of the tragedy McGinnis was seen standing at the corner of the building with a shotgun pointed in the direction of the officers, and when they attempted to arrest Harrison, he hollered, "Turn him loose, turn him loose," jumped up off the ground two or three times and fired his gun in the direction of the officers. (R., p. 43.) This was the first shot fired. (R., p. 50.) It hit officer Gilbert. (R., p. 106.)

LOUIS McLAUGHLIN.

The first two shots came from the front of the building where McGinnis and McLaughlin were standing. The defendant McLaughlin told the sheriff of Cleveland County that he fired the second shot. Just fired in the bunch of officers. (R., p. 39.)

GEORGE CARTER.

After the shooting, the defendant Carter went into one of the tents, just back of the union hall, and got under a cot, taking his gun with him, which he continued to try to use. As they pulled him out from under the cot, one of the officers remarked: "You shot the chief and you are fixing to shoot some of us," to which he replied: "The only reason I did not shoot you, I could not get my gun in position, or I would have done it." (R., p. 129.) He denied having shot the chief, but said: "I stopped him. I was the third man that shot. That is what I get $40 a week for."

JOSEPH HARRISON.

The State's evidence tends to show that the defendant Harrison was the guard who drew his gun on Gilbert as the officers came upon the union premises; and that he was present, armed with a shotgun, in furtherance of the unlawful conspiracy among the defendants. He heard the defendant Beal advise the strikers that they were a fighting union—not afraid of the police—had guards of their own who would take care of their property, etc. He was shot and found lying with the officers on the ground, close to Roach, after the encounter.

K. Y. HENDRICKS.

It is in evidence that when the officers came up, the defendant Hendricks was rather conspicuous, got up on an ice box and crowed like a rooster. (R., pp. 70 and 72.) After the shooting, he ran into a neighboring house and wanted to hide. There he is reported as saying: "We killed Chief Aderholt and Tom Gilbert, and I think Roach and one of our men is dying." He was described as being "scared to death—white as he could be." Speaking of his gun, he is alleged to have said: "I shot the damn thing out and throwed it to Vance Tramble and run." Hendricks was one of the guards stationed to protect the union headquarters and was present at one of the incendiary or inflammatory speeches made by the defendant Beal. (R., p. 75.)

CLARENCE MILLER.

The defendant Miller was guard manager of the tent colony. (R., p. 91.) Deputy Sheriff W. P. Upton arrived at the union hall within a few minutes after the shooting, saw Miller and asked him what the trouble was. He said, "If you will come inside I will try to explain it to you." Inside, the officer found five shotguns set at intervals of 6, 8 or 10 feet along the south side of the building, together with a lot of shells and cartridges. The shells were loaded with No. 4 shot, the size that hit the officers. When Miller was arrested, the officer asked him who did the shooting. He replied: "You know we have had the union headquarters torn down by thugs and we are going to protect this one." He further said the officers came down there and he ordered them off the premises.

After laying the proper predicate therefor, several witnesses were permitted, over objections duly entered, to give in evidence dying declarations of the deceased to the effect: "I don't see why they shot me." . . . "I don't know why any one wanted to shoot me." . . . "I don't know why they shot me in the back. I never did them any harm." . . . "I don't know why they shot me in the back and killed me. I didn't do anything." Motions to strike; overruled; exceptions.

On cross-examination, and over objections duly entered, the defendant Beal was asked if he did not distribute to the strikers through the union headquarters, before and during the strike, a Communist newspaper, published in New York, known as *The Daily Worker,* which contained several communications critical of the mill owners and police officers of the city of Gastonia, to which he replied: "They were not distributed under my supervision. I just asked for them. I requested them to be sent there and then let anybody take them who wanted them. This was some time during the strike." (R., p. 234.) The witness had already testified, without objection, to a letter signed by him and published in said paper under date of 28 May, 1929.

On cross-examination and over objections duly entered, Mrs. Edith Saunders Miller, wife of the defendant, Clarence Miller, was required to read from a publication, the substance of which she admitted teaching the strikers' children, as follows:

1. "Wherever workers go on strike on what side do you find the Government? The answer came in the Southern strikes with very great speed. Immediately the State troopers were ordered out on strike duty. Immediately the National Guard were ordered out to shoot down and to bayonet men, women and children on the picket line. It is clear where the government stands. The government stands with the bosses against the strikers. The government stands for slavery for the workers, misery and starvation for the workers' children. The government stands for child labor. The government is the tool of the bosses against the workers."

2. "Strikers' children! We call upon you to join the 'Young Pioneers,' an organization of workers' children all over the country. The Young Pioneers is that organization of the workers' children which fights for better conditions of the workers' children all the time; which fights against child labor; which fights against bosses' government; which fights for a workers' and farmers' government just like they have in Soviet Russia."

Again, for purposes of impeachment only, certain questions were propounded to this witness and answered, over objections duly entered, as follows:

"Q. Have you not taught in Gastonia that there is no God?

(No answer.)

"Q. Mrs. Miller, I ask you this question: 'Do you believe in the existence of a Supreme Being who controls the destiny of men, who rewards their virtues or punishes their transgressions here or hereafter?'

"A. No. I believe that man controls his own destiny.

"Q. Therefore, taking an oath and appealing to this Supreme Being would have no effect on you?

"A. I say any oath I take to tell the truth has a binding effect on me.

"Q. When you take it on the Bible and appeal to God, would that have any effect on you?

"A. Yes, it is an oath. Any oath will have an effect on me.

"Q. You might take it on an almanac just as you would on a Bible and it would have the same effect on you, wouldn't it?

"A. Yes—I'd tell the truth."

Just prior to the foregoing part of the cross-examination, to which exceptions were duly taken and entered, the witness testified, without objection, as follows:

"I testified in the *habeas corpus* hearing and took an oath to tell the truth. Put my hand on the Bible for the purpose of testifying in this case. I have taken the oath. Put my hands on the Bible, swore to tell the truth, the whole truth, and nothing but the truth, so help me, God."

The defendants proposed to show by Plummer Stewart, a practicing attorney of the city of Charlotte, "that he knew the defendants' witness, S. W. McKnight, knew his reputation and it was good." Objection; sustained; exception.

The substance of the following excerpt from the court's charge to the jury forms the basis of several exceptive assignments of error:

"Certain of the defendants, to wit, Beal, Carter and Hendricks, went on the stand and testified in their own behalf and so the court instructs you that when you come to consider the evidence of these three defendants, the law requires that you shall remember their relation to the case as defendants, the interest which they have in the result of your verdict, and to scrutinize their testimony with care to the end that you may determine to what extent, if any, their testimony has been biased by their interest, . . . and having so considered it, you will give to their testimony such weight as you consider it is entitled to and if you believe them you should give their testimony the same weight as you would give the testimony of any other credible witness."

There was a motion in arrest of judgment upon the second, third and fourth counts, on the alleged ground that the defendants were not required to plead to the bills containing these charges; overruled; exception.

The defendants lodged a motion that the court set aside the verdict in its discretion for alleged prejudicial appeals of the solicitor in his closing argument to the jury; overruled; exception.

Verdicts: Guilty of murder in the second degree as to each of the defendants on the first count; guilty as charged as to each of the defendants on the second and third counts; and guilty of an assault with a deadly weapon as to each of the defendants on the fourth count.

Judgments: As to the defendants Beal, Carter, Harrison and Miller, and each of them, imprisonment in the State's prison for a term of not less than 17 nor more than 20 years on the charge of murder or the first count; 10 years on the second count—the two sentences to run concurrently—and prayer for judgment continued on the third and fourth counts. As to the defendants, McGinnis and McLaughlin, and each of them, imprisonment in the State's prison for a term of not less than 12 nor more than 15 years on the charge of murder or the first count; not less than 5 nor more than 7 years on the second count—the two sentences to run concurrently—and prayer for judgment continued on third and fourth counts. As to the defendant Hendricks, imprisonment in the State's prison for a term of not less than 5 nor more than 7 years on the charge of murder or the first count; 5 years on the second count—the two sentences to run concurrently—and prayer for judgment continued on the third and fourth counts.

The defendants appeal, assigning errors.

Attorney-General Brummitt, Assistant Attorney-General Nash and A. G. Mangum for the State.

I. E. Ferguson, Thomas W. Hardwick and J. F. Flowers for defendants.

STACY, C. J., after stating the case: The one overshadowing circumstance, appearing on the record, which gives decided color and tone to the State's case, is that, when the shooting was over and the smoke of the guns had cleared away, it was discovered that three of the officers, and Roach who came with them, had been shot, one slightly hurt, two seriously injured, and the chief of police mortally wounded; while the defendants, with the exception of Joseph Harrison, were unharmed.

The case in brief, from the State's viewpoint, is simply this: Aderholt, Gilbert and Roach were shot down, being hit in the back, at least Aderholt was, while going with the guard under arrest from the front yard of the union premises to the city car. Ferguson, who was standing a short distance in front of them and near the automobile, was also shot. The fact that the defendant Harrison was shot down at the same time and found lying with the officers would seem to indicate that he, and not George Carter who sustained no injuries, was the guard with the officers in the line of fire; leastwise the evidence clearly permits the inference, if it does not compel the conclusion.

Under these circumstances, the prosecution evidently contended with convincing logic that to accept the suggestion of the defendants that the injured officers were the victims of their own guns would be to reject all the natural evidence in the case and to substitute theory for fact. At any rate, the inculpatory circumstances, appearing on the record, are quite sufficient to carry the case to the jury as against each and all of the defendants. *S. v. Allen,* 197 N. C., 684, 150 S. E., 337.

The practice is now so firmly established as to admit of no questioning that, on a motion to nonsuit, the evidence is to be considered in its most favorable light for the prosecution. *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. And further, the general rule is, that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury; otherwise not, for short of this, the judge should direct a nonsuit or an acquittal in a criminal prosecution. *S. v. Vinson,* 63 N. C., 335. But if the evidence warrant a reasonable inference of the fact in issue, it is for the jury to say whether they are convinced beyond a reasonable doubt of such fact, the fact of guilt. *S. v. McLeod,* 198 N. C., 649; *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644.

Indeed, as to the defendant Beal, his immediate departure from the community was a circumstance worthy of consideration by the jury, especially in view of the fact that he was regarded as the guiding genius of the strike, and, as the State contends, had counseled violence. *S. v. Mull,* 196 N. C., 351, 145 S. E., 677; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Stewart,* 189 N. C., 340, at p. 347, 127 S. E., 260; *S. v. Malonee,* 154 N. C., 200, 69 S. E., 786. And while the absence of the defendant Harrison from the witness stand, as a matter of law, created no presumption against him, and was not a proper subject for comment by counsel in arguing the case before the jury, nevertheless his failure to testify, of necessity, left the jury to infer the facts without the benefit of any statement from him. *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101.

That the defendants had conspired and unlawfully agreed among themselves to resist the officers to the death, and to shoot and shoot to kill, in case their plans were interrupted or their purposes frustrated, as alleged and contended by the State, is a permissible inference from all the facts in the case. The evidence tends to show that instructions to this effect were given by Beal and executed by the defendants. *S. v. Wrenn,* 198 N. C., 260, 151 S. E., 261.

Thus the State made out a prima facie case of conspiracy against the defendants, rendering the acts and declarations of each, done or uttered in furtherance of the common design, admissible in evidence against all, and the demurrers to the evidence were properly overruled. *S. v. Ritter, ante,* 116, *S. c.,* 197 N. C., 113, 147 S. E., 733. "Every one who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." *S. v. Jackson,* 82 N. C., 565.

Moreover, it is a settled principle of law, apparently applicable to the facts of the instant case, that where a number of persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127.

With respect to the demurrer interposed by the defendants to the bill of particulars filed by the solicitor, it is perhaps sufficient to say that, in this jurisdiction, a bill of particulars is not regarded as a part of the indictment. It may be amended at any time, with permission of the court, on such terms or under such conditions as are just, and is not subject to demurrer. *S. v. Wadford,* 194 N. C., 336, 139 S. E., 608. The office of a bill of particulars is to advise the court, and more particularly the accused, of the specific occurrences intended to be investigated on the trial, and to regulate the course of the evidence by limiting it to the matters and things stated therein. C. S., 4613; *McDonald v. People,* 126 Ill., 150; 31 C. J., 752.

The demurrer to the bill on the grounds of duplicity and indefiniteness, was likewise properly overruled. *S. v. Knotts,* 168 N. C., 173, 83 S. E., 972. C. S., 4623, provides against quashal for informality if the charge be plain, intelligible and explicit, and sufficient matter appear in the bill to enable the court to proceed to judgment. *S. v. Haney,* 19 N. C., 390. Besides, duplicity is ground only for a motion to quash, made in apt time, and is cured by verdict. *S. v. Burnett,* 142 N. C., 577, 55 S. E., 72. By apt time, in this connection, is meant before plea, for after plea of not guilty is entered, a motion to quash is allowable only in the discretion of the court. *S. v. Burnett, supra.*

Nor were the defendants entitled to their discharge because of the order of mistrial, entered at the August Term as a matter of physical necessity, *i. e.,* the insanity of one of the jurors. *S. v. Tyson,* 138 N. C., 627, 50 S. E., 456. It is now the approved practice that in cases of necessity, which are of two kinds, "physical necessity and the necessity of doing justice," a mistrial may be ordered in capital as well as other cases. *S. v. Bell,* 81 N. C., 591; *S. v. Wiseman,* 68 N. C., 203.

Even under the decisions in *S. v. Garrigues,* 2 N. C., 241, *In re Spier,* 12 N. C., 491, and *S. v. Ephraim,* 19 N. C., 162, where the authority of the court to order a mistrial in capital cases, without the consent of the accused, was restricted to "urgent and overruling necessity," and denied as a discretionary right, the present order could readily be upheld. But the strictness of these earlier decisions has been greatly relaxed in a number of the more recent cases. *S. v. Cain,* 175 N. C., 825, 95 S. E., 930; *S. v. Upton,* 170 N. C., 769, 87 S. E., 328; *S. v. Dry,* 152 N. C., 813, 67 S. E., 1000; *S. v. Prince,* 63 N. C., 529; 8 R. C. L., 153.

The law on the subject is stated in *S. v. Tyson, supra,* as follows: "It is well settled, and admits of no controversy, that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge; but in capital cases he is required to find the facts fully and place them upon record, so that upon a plea of former jeopardy as in this case, the action of the court may be reviewed."

And in *S. v. Cain, supra,* the following was quoted from 8 R. C. L., 153, with approval: "Under the strict practice which anciently prevailed, in England at least, the discharge of the jury in a criminal case for any cause after the proceeding had advanced to such a stage that jeopardy had attached, but before a verdict of acquittal or conviction, was held to sustain a plea of former jeopardy, and therefore to operate practically as a discharge of the prisoner. In deference, however, to the necessities of justice, this strict rule has been greatly relaxed and the general modern rule is that the court may discharge a jury without working an acquittal of the defendant in any case where the ends of justice, under the circumstances, would otherwise be defeated."

The fact that one of the defendants, of his own volition, had temporarily absented himself from the court room when the order of mistrial was first entered, did not deprive the court of the power, on learning of the situation, to strike out the order of recess and repeat the proceedings in the presence of all the defendants, if such were necessary, which may be doubted, the dictum in *S. v. Alman,* 64 N. C., 364, to the contrary notwithstanding. To hold otherwise on the facts of the present record would be to "strain at a gnat, and swallow a camel."—Matt. 23:24. "The judge is not a mere moderator, and it would detract very much from the efficiency and economy of the administration of justice if he were hampered with arbitrary rules as to matters which have always been committed to his sound discretion." *S. v. Southerland,* 178 N. C., 676, 100 S. E., 187.

The order of mistrial in the instant case was fully justified, indeed rendered necessary, by the facts found by the court, fully set forth in the record, and the motion of the defendants for their discharge upon this ground was properly denied. *S. v. Dry, supra.*

It follows, therefore, as a necessary corollary, that, if the order of mistrial were properly entered, and we think it was, the defendants' subsequent plea of former jeopardy cannot be sustained. *S. v. Tyson, supra; S. v. Scruggs,* 115 N. C., 805, 20 S. E., 720; *S. v. Carland,* 90 N. C., 668; *S. v. Washington,* 90 N. C., 664. In capital cases as well as others, where, for sufficient cause found and set forth in the record, the judge discharges the jury before verdict, it is proper to hold the prisoner for another trial. *S. v. Jefferson,* 66 N. C., 309.

In passing, it may be added that if the defendants were not on trial for murder in the first degree at the August Term, which does not affirmatively appear from the record (our only source of judicial knowledge, *Southerland v. Crump, ante,* 111), the discharge of the jury was a matter resting in the sound discretion of the court. *S. v. Guthrie,* 145 N. C., 492, 59 S. E., 652. And it is further suggested, that, assuming the proceeding at the August Term was for the capital offense, the defendants have not again been put on trial for their lives. But we have considered these exceptions as debated on brief.

The defendants stressfully contend that the dying declarations of the deceased, O. F. Aderholt, as detailed by a number of witnesses, should have been excluded, because, it is said, they contain expressions of opinion, rather than statements of fact, and do not purport to identify the defendants as the persons who did the shooting. The State, on the other hand, says that to sustain these exceptions would be to sacrifice the principle under which dying declarations are received in evidence to a mere form of words.

It will be readily conceded that dying declarations which state only opinions or conclusions of the declarant are not admissible in evidence. *S. v. Williams,* 67 N. C., 12; *S. v. Jefferson,* 125 N. C., 712, 34 S. E., 648; Underhills Crim. Ev. (3d), 244.

Proper foundation or predicate was laid for the introduction of the dying declarations in question, and the ruling of the court in admitting them is fully sustained by what was said in *S. v. Franklin,* 192 N. C., 723, 135 S. E., 859; *S. v. Hall,* 183 N. C., 806, 112 S. E., 431; *S. v. Williams,* 168 N. C., 191, 83 S. E., 714; *S. v. Bohanon,* 142 N. C., 695, 55 S. E., 797, and *S. v. Mace,* 118 N. C., 1244, 24 S. E., 798.

The general rule is, that, in prosecutions for homicide, declarations of the deceased, made while sane, when *in extremis* or *in articulo mortis,* and under the solemn conviction of approaching dissolution, concerning the killing or facts and circumstances which go to make up the *res* *gestæ* of the act, are admissible in evidence, provided the deceased, if living and offered as a witness in the case, would be competent to testify to the matters contained in the declarations. *S. v. Shelton,* 47 N. C., 360; *S. v. Williams,* 67 N. C., 12; *S. v. Mills,* 91 N. C., 594; *S. v. Behrman,* 114 N. C., 797, 19 S. E., 220; *S. v. Jefferson, supra; S. v. Laughter,* 159 N. C., 488, 74 S. E., 913; *Tatham v. Mfg. Co.,* 180 N. C., 627, 105 S. E., 423; *Williams v. R. R.,* 182 N. C., 267, 108 S. E., 915; *Dellinger v. Building Co.,* 187 N. C., 845, 123 S. E., 78; Lockhart on Evidence, 148; 21 Cyc., 974; 1 R. C. L., 527.

We have a number of decisions to the effect that dying declarations are admissible in cases of homicide when they relate to the act of killing, or to the circumstance so immediately attendant thereon as to constitute a part of the *res gestæ,* and appear to have been made by the victim in the present anticipation of death, which ensues. *S. v. Laughter, supra.* It is not always necessary that the deceased should express a belief in his impending demise; it is sufficient if the circumstances and surroundings in which he is placed indicate that he is fully under the influence of the solemnity of such a belief, and so near the point of death as to "lose the use of all deceit"—in Shakespeare's phrase. *S. v. Bagley,* 158 N. C., 608, 73 S. E., 995. In *S. v. Tilghman,* 33 N. C., 513, the Court said: "It is not necessary that the person should be *in articulo mortis* (the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn as if an oath had been administered."

It is the uniform holding, here and elsewhere, that dying declarations, otherwise admissible, are not rendered incompetent by reason of the fact that they contain statements tending to show provocation, or the want of it, on the part of the accused, when such utterances relate immediately to the act of killing, for then they are regarded as "short-hand statements of fact." *Marshall v. Telephone Co.,* 181 N. C., 292, 106 S. E., 818; *S. v. Mace, supra; S. v. Crean,* 43 Mont., 47, Ann. Cas., 1912C, 424, and note. Touching this point, the following from Chamberlayne on Evidence was quoted with approval in *S. v. Williams,* 168 N. C., 191, 83 S. E., 714:

"A sufficient administrative necessity for accepting an inference or conclusion in a dying declaration is furnished where a large number of minute phenomena, often so intangible and interblending as to forbid effective individual statement, are given by the declarant in the form of a 'collective fact,' often the only way in which a speaker can well express himself. Thus, a declarant may properly state that a given shooting was an 'accident' or that he had been 'butchered' by the malpractice of a doctor, and so forth. Even where a considerable element of voluntary or intentional reasoning is present, the declaration may simply amount to the statement of a fact in a vigorous and striking way, summarizing a number of facts in a single vivid expression, *e. g.,* 'He shot me down like a dog.' "

Nor was it error in the instant case for the trial court to overrule the defendants' objections to the dying declarations of the deceased on the alleged ground that they did not purport to identify the defendants as the persons who did the killing. The statements of the deceased, in detailing the facts attending the infliction of his fatal wounds, were evidently intended to relate to those who were present with guns, shooting, and the conclusion is permissible that his references were to the defendants or to those on trial. *S. v. Arnold,* 35 N. C., 184. But even if this were doubtful, such doubt on the facts of the present record would only affect the weight, and not the competency, of the declarations. *S. v. Watkins,* 159 N. C., 480, 75 S. E., 22.

The cross-examination of the defendant Beal with respect to the distribution among the strikers of a Communist newspaper, known as *The Daily Worker,* was competent as tending to show the purposes and objects which the members of the union had in mind, and the methods by which they proposed to accomplish those objects. It is a permissible inference that, as these publications containing criticisms of the police officers of the city of Gastonia, were distributed through the union headquarters, the members of the organization thereby intended to make such criticisms their criticisms, and any suggestions contained therein, their suggestions and advice. *Spies v. People,* 122 Ill., 1, 3 Am. St. Rep., 322, at p. 444; *S. c.,* 123 U. S., 131.

Furthermore, it is an unquestioned truism that the cross-examination of a witness may be pursued by counsel as a matter of right so long as it relates to facts in issue or relevant facts which were the subject of his examination-in-chief. *Milling Co. v. Highway Com.,* 190 N. C., 692, 130 S. E., 724. When, however, it is sought to go beyond the scope of the examination-in-chief, for purposes of determining the interest or bias of the witness and to impeach his credibility, the method and duration of the cross-examination for these purposes rest largely in the discretion of the trial court. *S. v. Patterson,* 24 N. C., 346; Wigmore on Evidence (2d ed.), sec. 944 *et seq.;* 28 R. C. L., 445. In *S. v. Davidson,* 67 N. C., 119, it was said that the tendency of modern decisions is to allow almost any question to be put to a witness, and to require him to answer it, unless it should subject him to a criminal prosecution. This was approved in *S. v. Lawhorn,* 88 N. C., 634, and *S. v. Robertson,* 166 N. C., 356, 81 S. E., 689. But in *S. v. Winder,* 183 N. C., 776, 111 S. E., 530, it was suggested that the rule, thus broadly stated, was subject to some exceptions, and called attention to the opinion in *S. v. Holly,* 155 N. C., 485, 71 S. E., 450, and what was said therein as to collateral testimony on the question of character.

The strike, it should be remembered, was being conducted by the National Textile Workers Union, of which the defendant Beal was an officer and representative. The evidence tends to show that he was in reality the leader of the strikers and their chief counsellor. Hence, it was competent to cross-examine him as to the part he took in the distribution of the publications in question. *Spies v. People, supra.*

What has been said with respect to the cross-examination of the defendant Beal, concerning the distribution of copies of *The Daily Worker,* applies equally to the cross-examination of Mrs. Edith Saunders Miller, wife of Clarence Miller, relative to the substance of what she taught the strikers' children. Mrs. Miller was organizer of the children's section of the union and had been asked by the national office, in fact by the president of the union, to come to Gastonia and help organize the workers in the textile industry, which she was then engaged in doing. Note to *Spies v. People,* 3 Am. St. Rep., 473.

It is charged that the defendants had conspired and unlawfully agreed among themselves to resist the officers of the law, representatives of the government, and it was, therefore, competent to ascertain what part, if any, they took in exciting resistance to the officers and discontent with the government. *King v. Hunt,* 3 Barn. & Ald., 566. The questions propounded in this respect were not improper. *Commonwealth v. Sacco,* 255 Mass., 369, at p. 439.

We now come to the exceptions upon which the defendants place great reliance for a reversal of the judgments, to wit, those taken during the cross-examination of Mrs. Miller with respect to her religious views.

The question sought to be presented by these exceptions is whether the witness, whose competency as such is not assailed, and who is not a party, can be interrogated, on cross-examination, as to her religious belief or unbelief, for the purpose of discovering her credibility.

The right so to interrogate a witness has been affirmed in some jurisdictions and denied in others, depending upon the constitutional and statutory provisions in the respective states at the time. *S. v. Washington,* 49 La. Ann. Cas., 1602; 42 L. R. A., 553, and note; *Clinton v. State,* 53 Fla., 98, 12 Ann. Cas., 151, and note; 40 Cyc., 2613.

It was provided by section 19 of the Declaration of Rights, Constitution of North Carolina of 1776, "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own conscience." This was amended with the adoption of the Constitution of 1868, so as to read as follows: "Sec. 26. Religious liberty. All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience."

We are not now called upon to say, nor do we decide, what effect, if any, this change in the organic law had upon the then existing disqualification of witnesses, or upon the right of the Legislature thereafter to render persons incompetent to testify as witnesses, on account of their opinions on matters of religious belief. Nor do we find any case, heretofore decided, dealing with the effect of this change. *S. v. Pitt,* 166 N. C., 268, 80 S. E., 1060; *Lanier v. Bryan,* 184 N. C., 235, 114 S. E., 6.

The point stressed on the argument and debated on brief is not what questions may be put to a person on his *voir dire* to test his competency to be sworn as a witness, but whether a witness, whose competency is not challenged and who is not a party, may be interrogated, on cross-examination, concerning his opinions on matters of religious belief, for the purpose of affecting his credibility.

Under sections 3189, 3190 and 3191 of the Consolidated Statutes witnesses are required to be sworn or affirmed to speak the truth before they are allowed to testify, but we have no statute dealing with the exact question under review. See valuable article by Hon. J. Crawford Biggs in North Carolina Law Review, December, 1929, entitled, "Religious Belief as Qualification of a Witness." And further, as bearing on the policy of the State, it may be observed that "all persons who shall deny the being of Almighty God" are disqualified for office under Article VI, sec. 8, of the Constitution. Ours is a religious people. This is historically true. American life everywhere, as expressed by its laws, its business, its customs, its society, gives abundant recognition and proof of the fact. *Church of the Holy Trinity v. United States,* 143 U. S., 457.

Competency and credibility are two different things. A person may be a competent witness and yet not a credible one. The law declares his competency, but it cannot make him credible. "The credibility of a witness is a matter peculiarly for the jury, and depends not only upon his desire to tell the truth, but also, and sometimes even to a greater extent, upon his insensible bias, his intelligence, his means of knowledge and powers of observation." *Cogdell v. R. R.,* 129 N. C., 398, 40 S. E., 202.

Cross-examination is one of the principal tests which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears witness, the manner in which he has used those means, his powers of discernment, memory, etc., may all be fully investigated in the presence of the jury, to the end that an opportunity may be afforded for observing his demeanor and determining the weight and value which his testimony merits. *Milling Co. v. Highway Commission, supra.* Ordinarily, therefore, a witness may be asked any questions on cross-examination which tend to test his accuracy, to show his interest or bias, or to impeach his credibility. Gr. Ev. (16th ed.), sec. 446.

This much is conceded, but it is contended that a personal scrutiny into one's faith and conscience, or defect of religious sentiment and belief according to the prevailing opinion of the community at the time, has no proper bearing on the question as to whether he condemns falsehood or holds truth as a virtue, and is therefore contrary to the spirit of American institutions. *Brink v. Stratton,* 176 N. Y., 150, 63 L. R. A., 182; *Bush v. Commonwealth,* 80 Ky., 244; *Free v. Buckingham,* 59 N. H., 219; *Perry v. Commonwealth,* 3 Gratt. (Va.), 632.

The following statement appears in 30 A. & E. Enc. of Law, 1096: "Laws providing that no person shall be incompetent to testify on account of religious belief, that no control of or interference with rights of conscience shall be permitted, or the like, have been held not only to make persons competent to testify without regard to religious belief or unbelief, but also to prevent any inquiry into that belief for the purpose of affecting credibility." *People v. Copsey,* 71 Cal., 548; *Starks v. Schlensky,* 128 Ill. App., 1; *Dickinson v. Beal,* 10 Kan. App., 233; *People v. Jenness,* 5 Mich., 305; *White v. Com.,* 96 Ky., 180; *Louisville, etc., R. Co. v. Mayes,* 26 Ky., 187.

But is it an interference with the rights of conscience, or an effort to control such rights (prohibited by our Constitution), to interrogate a witness about his opinions on matters of religious belief? It is not proposed to change his opinions or to disturb them in any way. It is only sought to discover what opinions he entertains—those of his own choosing—so as to enable the jury, as far as such indications will allow, to know what manner of thoughts he is thinking at the time he testifies. It has been said that a man is what he thinks, "For as he thinketh in his heart, so is he." Prov. 23:7.

It has been held, in a number of States, where persons are excluded as witnesses for defect of religious sentiment and belief, that if the ordinary oath is administered to a witness, without his making any objection to its form, he may be asked, on cross-examination, whether he thinks the oath binding on his conscience. I Gr. Ev., sec. 371. See, also, *Stanbro v. Hopkins,* 28 Barb. (N. Y.), 265.

And in *Carver v. U. S.,* 164 U. S., 694, speaking of dying declarations and their impeachment, the Court said: "They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of rewards or punishments," citing a number of cases as authority for the position. To like effect is the decision in *Cambrell v. State,* 92 Miss., 728, 31 Am. St. Rep., 549, 17 L. R. A. (N. S.), 291.

It is not an interference with the constitutional rights and liberties of a witness to require him to disclose, on cross-examination, his present situation, employment and associates; as for example, in what locality he resides, what occupation he pursues, and whether or not he is intimately acquainted and conversant with certain persons; for, however these may disparage him in the eyes of the jury, they are of his own selection, and constitute proper matters of inquiry; subject, of course, to the rule against self-incrimination. Gr. Ev., sec. 456; *S. v. Simpson,* 9 N. C., 580; Note, 75 Am. St. Rep., 318; 28 R. C. L., 423.

On the other hand, it may be queried that, if one's religious belief or unbelief is not to affect his competency as a witness, but may be inquired of to affect his credibility, have not his rights of conscience, for all practical purposes, been affirmed and denied in the same breath? What boots it, ask the advocates of this view, whether he be refused the right to testify altogether, or being permitted to testify, have his testimony discredited and rejected by the jury, if, in the end, they both amount to the same thing? In this connection, it is contended that there is no essential difference between a refusal to hear and a rejection after hearing. *Brink v. Stratton, supra; Bush v. Commonwealth, supra; Perry v. Commonwealth, supra.* By statute in Indiana, and perhaps in other States, it is provided that want of religious faith shall not affect the competency of a witness, but shall go only to his credibility. *Snyder v. Nations,* 5 Blackf., 295.

There are those who feel more deeply over religious matters than they do about secular things. It would be almost unbelievable, if history did not record the tragic fact, that men have gone to war and cut each other's throats because they could not agree as to what was to become of them after their throats were cut. Many sins have been committed in the name of religion. Alas! the spirit of proscription is never kind. It is the unhappy quality of religious disputes that they are always bitter. For some reason, too deep to fathom, men contend more furiously over the road to heaven, which they cannot see, than over their visible walks on earth; and it is with these visible walks on earth alone that we are concerned in the trial of causes. In recognition of this fact and because "our civil rights have no dependence on our religious opinions," as proclaimed by Thomas Jefferson and embodied in the Virginia statute of religious freedom, it was provided in the North

Carolina Constitution of 1868, that "no human authority should, in any case whatever, control or interfere with the rights of conscience."

Cogent reasons may be advanced on both sides of the question, and were advanced on the argument in this case. But we do not think the record calls for an interpretation of the constitutional provision, above set out, or for a definite ruling on the question debated. The answers of the witness, taken in connection with her previous testimony, do not show that she intended to express disbelief in a Supreme Being, or to deny all religious sense of accountability, such as would have disqualified her as a witness at the common law, or under the Declaration of Rights of 1776. *Shaw v. Moore,* 49 N. C., 25; Note, 12 Ann. Cas., 155. But even if error were committed in not sustaining objections to the questions propounded, which is not conceded, it would seem that, in the light of the answers elicited, no appreciable harm has come to the defendants, if harm at all, and that the verdicts and judgments ought not to be disturbed on account of these exceptions.

Mere error in the trial of a cause is not sufficient ground for a reversal of the judgment. To accomplish this result, it should be made to appear that the ruling was material and prejudicial to appellant's rights. *S. v. Heavener,* 168 N. C., 156, 83 S. E., 732; *S. v. Smith,* 164 N. C., 475, 79 S. E., 979; *Cotton Mill v. Hosiery Mills,* 181 N. C., 33, 106 S. E., 24. The foundation for the application of a new trial is the allegation of injustice arising from error, but for which a different result would likely have ensued, and the motion is for relief upon this ground. Unless, therefore, some wrong has been suffered, there is nothing to relieve against. The injury must be positive and tangible, and not merely theoretical. *In re Ross,* 182 N. C., 477, 109 S. E., 365; *Brewer v. Ring and Valk,* 177 N. C., 476, 99 S. E., 358.

The exception with respect to what the defendants proposed to show by Plummer Stewart, offered as a sustaining character witness to a character witness, is not properly presented. It is not stated that the witness, if allowed to testify, would have qualified and given evidence as suggested. *S. v. Steen,* 185 N. C., 768, 117 S. E., 793. The exception is not sustained.

The instruction of the court that the testimony of the defendants who went upon the stand and testified in their own behalf, should be scrutinized with care to ascertain to what extent, if any, their testimony was warped or biased by their interest, adding, however, that if, after such scrutiny, they believe the defendants, they should give the same credit to their testimony as if they were disinterested, is supported by what was said in *S. v. Ray,* 195 N. C., 619, 143 S. E., 143; *S. v. Green,* 187 N. C., 466, 122 S. E., 178; *S. v. Lance,* 166 N. C., 411, 81 S. E., 1092; *S. v. Fogleman,* 164 N. C., 458, 79 S. E., 879; *S. v. Graham,* 133 N. C., 645, 45 S. E., 514; *S. v. Lee,* 121 N. C., 544, 28 S. E., 552; *S. v. Byers,* 100 N. C., 512, 6 S. E., 420. The exceptions to this instruction are not well founded.

The motion in arrest of the judgments on the second, third and fourth counts, for that, it is alleged, the defendants were not required to plead to the bills containing these charges, was properly overruled. *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190; Note, 13 L. R. A. (N. S.), 811.

In the first place, no objection seems to have been entered by the defendants to the motion of the solicitor that the four bills be consolidated and tried as different counts in a single indictment. *S. v. Lewis,* 185 N. C., 640, 116 S. E., 259. The defendants had already entered a plea of not guilty to the principal bill charging murder, and it may well be said that this plea applied to any and all counts, subsequently added thereto without objection, which related to the same transaction. *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248; *S. v. McNeill,* 93 N. C., 552. But if it were otherwise, and the principle announced in *S. v. Cunningham,* 94 N. C., 824, that an issue raised by plea is essential to a valid verdict, should be held to be applicable, still this could avail the defendants but little on the present record, because they were specifically convicted on the first count, which is not challenged by the motion in arrest. *S. v. Toole,* 106 N. C., 736, 11 S. E., 168.

Furthermore, the sentences on all the counts, as to each and all of the defendants, are made to run concurrently, and, in each instance, the judgment on the first count is longer than the sum of the judgments on the other counts. So, even if error were committed with respect to these lesser counts, it would not affect the verdict and judgment on the first count. *S. v. Coleman,* 178 N. C., 757, 101 S. E., 261; *S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590.

The motion to set aside the verdicts and for a new trial on the ground of alleged prejudicial appeals by the solicitor in his closing argument to the jury is, in its very terms, addressed to the discretion of the court, and there is nothing on the record to show any abuse of discretion or that the solicitor exceeded the limits of fair debate. *S. v. Phifer,* 197 N. C., 729, 150 S. E., 353; *S. v. Green, ibid.,* 624, 150 S. E., 18; *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720.

The general rule is, that what constitutes legitimate argument in a given case is to be left largely to the sound discretion of the trial court, which will not be reviewed on appeal unless the impropriety of counsel be gross and well calculated to prejudice the jury. *Lamborn v. Hollingsworth,* 195 N. C., 350, 142 S. E., 19; *Jenkins v. Ore Co.,* 65 N. C., 563.

Speaking to the subject in *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838, *Walker, J.,* delivering the opinion of the Court, said: "We conclude, therefore, that the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and direction of the presiding judge, who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and when counsel grossly abuse their privilege at any time in the course of the trial the presiding judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the judge to interfere in order to preserve the due and orderly administration of justice and to prevent prejudice and to secure a fair and impartial trial of the facts, it is not his duty to do so in the sense that his failure to act at the time or to caution the jury in his charge will entitle the party who alleges that he has been injured to a new trial. Before that result can follow the judge's inaction, objection must be entered at least before verdict."

This was further amplified in *S. v. Davenport,* 156 N. C., 596, 72 S. E., 7, as follows: "In the passage taken from *S. v. Tyson,* we did not intend to decide that a failure of the judge to act immediately would be ground for a reversal, unless the abuse of privilege is so great as to call for immediate action, but merely that it must be left to the sound discretion of the court as to when is the proper time to interfere; but he must correct the abuse at some time, if requested to do so; and it is better that he do so even without a request, for he is not a mere moderator, the chairman of a meeting, but the judge appointed by the law to so control the trial and direct the course of justice that no harm can come to either party, save in the judgment of the law, founded upon the facts, and not in the least upon passion or prejudice. Counsel should be properly curbed, if necessary, to accomplish this result, the end and purpose of all law being to do justice. Every defendant 'should be made to feel that the prosecuting officer is not his enemy,' but that he is being treated fairly and justly. *S. v. Smith,* 125 N. C., 618."

In the instant case, it appears that the court promptly stopped the solicitor on objection being made to his argument by counsel for the defendants, and at one time the court of its own motion directed the solicitor to stay within the record, but there is nothing to show the character of the argument or that the judge failed to do his full duty in this respect.

There are numerous other exceptions in the case, all of which have been examined with care. Even if there be technical error in some of the rulings, this alone would not work a new trial. We are convinced, from a searching scrutiny of all that transpired on the hearing, to which exceptions have been taken, that substantial justice has been done, and that no reversible error has been made to appear. The verdicts and judgments, therefore, will be upheld.

No error.

ROBERT E. POSEY ET AL. v. BOARD OF EDUCATION OF BUNCOMBE COUNTY ET AL.

(Filed 20 August, 1930.)

1. **Schools and School Districts E b—Legislature has constitutional power to require a city to operate kindergarten schools.**

   Where schools have been established and maintained in a district in accordance with the minimum requirements of the Constitution, and where the fund available for the support of the schools, derived in part from local taxes validly levied in the district, is sufficient for the maintenance of said schools and also for the maintenance of a kindergarten school established in the district, the Legislature has the power to require the school board or committee of the district to maintain such kindergarten school as a part of the public school system of the district, Article IX, section 2, but if an additional tax is necessary for the maintenance of kindergarten schools they may be maintained only with the approval of the qualified voters of the district. C. S., 5443.

2. **Same—Statute providing for operation of kindergarten school in Asheville is mandatory on school committee.**

   Where the General Assembly has passed a statute authorizing the school committee of a city to take under control and maintain a kindergarten school previously operated by a private corporation and to receive as a gift the property of such corporation, and thereafter the corporation has conveyed to the city in fee its property both real and personal, and the kindergarten school has been maintained out of the public school fund of the city without the levy of any special tax for that purpose, and thereafter a special tax is levied for the public school fund under a valid election, and the city is later made a local tax district by statute providing that the special tax remain in force and that the "present standard of education be maintained": *Held,* the statute imposes a mandatory duty on the school board or committee of the local tax district to maintain such kindergarten school, it not appearing of record on appeal that the school funds were insufficient for the support of the kindergarten school or that a special tax would be necessary therefor.

3. **Same—School board does not have discretionary power to discontinue kindergarten school made mandatory by statute.**

   Where the school board or committee of a city constituting a local tax district is required by mandate of statute to operate a kindergarten school as a part of its system of public schools, its discretionary powers extend only to the manner in which the school shall be operated and not to whether it should be operated or not, and injunction will lie restraining it from carrying out its resolution to discontinue the operation of such kindergarten school.

APPEAL by plaintiffs from *Johnson, Special Judge,* at April Term, 1930, of BUNCOMBE. Reversed.

This is a controversy without action (C. S., 626) involving the opposing contentions of the parties hereto, upon a statement of facts agreed, with respect to the power of the defendants to discontinue the kindergarten schools heretofore maintained and operated as a part of the public school system of the city of Asheville.

The plaintiffs, residents and taxpayers of the city of Asheville, contend that it is the duty of the defendants to maintain the kindergarten schools heretofore established and maintained, under express statutory authority, as a part of the public school system of the city of Asheville, and to pay the cost of such maintenance out of funds collected from the taxpayers of said city, by reason of a special tax levied and collected under statutory authority, pursuant to a special election heretofore held in the city of Asheville, and that the defendants are without power to discontinue said kindergarten schools, as part of the public school system of the city of Asheville, as defendants have declared it is their purpose to do. Upon the facts agreed, plaintiffs pray judgment that defendants be enjoined from discontinuing said kindergarten schools, at the expiration of the current school year.

The defendants, the board of education of Buncombe County, and the school committee, or school board of the city of Asheville, contend that they are under no legal duty to maintain said kindergarten schools, for that said schools are not a part of the public school system of the city of Asheville; that if they have the power to maintain said kindergarten schools, and to pay the cost of such maintenance out of the public school fund available for the maintenance and operation of the public school system of the city of Asheville, whether or not they shall exercise this power, is within their discretion, and that, in the exercise of such discretion, having ordered that said kindergarten schools be discontinued, after the expiration of the current school year, their action is not subject to judicial review, at least in the absence of any contention on the part of plaintiffs, that such action on their part was arbitrary or unreasonable. Upon the facts agreed, defendants pray judgment that the plaintiffs are not entitled to the judgment prayed for by them, and that the controversy without action be dismissed.

Upon the facts agreed, the court was of opinion that the kindergarten schools heretofore maintained in the city of Asheville, are not a part of the public school system of this State within the meaning of the Constitution of the State or of the general school law, and that the defendants have no power under the law to continue to maintain said kindergarten schools in the city of Asheville; that if the said kindergarten schools are a part of the public school system of the city Asheville, and the defendants have the power under the law to maintain said schools, such power is discretionary; and that the action of the defendants in ordering the discontinuance of said kindergarten schools, at the expiration of the current school year, was the result of the exercise by defendants of their discretion.

In accordance with the opinion of the court upon the facts agreed, it was ordered, adjudged and decreed that the plaintiffs are not entitled to the relief sought by them, and that the controversy without action be dismissed, at the cost of the plaintiffs.

From this judgment, plaintiffs appealed to the Supreme Court, assigning error upon their exception to the judgment.

J. G. Merrimon and John H. Cathey for plaintiffs.
George Pennell and Chas. N. Malone for defendants.

CONNOR, J. Prior to the year 1907, the Asheville Free Kindergarten Association, a corporation organized and existing under the laws of this State, maintained and operated in the city of Asheville, certain free kindergarten schools for the benefit of the children of the taxpayers of said city, between the ages of three and six years. The said Kindergarten Association had acquired by gifts, subscriptions, purchase and otherwise, valuable property, both real and personal, which it owned and used for the purpose of maintaining and operating said kindergarten schools.

The General Assembly of North Carolina, at its session held in 1907, enacted chapter 175, Private Laws of North Carolina, 1907, which is entitled "An act to authorize the school committee of the city of Asheville to take under control the free kindergarten schools of the city of Asheville." By this statute the school committee of the city of Asheville was authorized to take under its control and to include in the school population of said city, all children residing therein of not less than three years of age, for the purpose of having said children taught in kindergarten schools, "A system of which shall be maintained in said city by said school committee." The said school committee was further authorized to receive from the Asheville Free Kindergarten Association, as a gift, all the property, both real and personal, then owned by said association, and used by it in the operation of kindergarten schools in the city of Asheville. It was expressly provided by said statute that said school committee should maintain, support, carry on and conduct in said city of Asheville such free kindergarten schools as should be necessary for the accommodation of such pupils as should properly be taught in schools of that character.

Subsequent to the enactment of said statute, the Asheville Free Kindergarten Association conveyed all its property, both real and personal, to the city of Asheville, in fee simple. The city of Asheville has, since said conveyance, sold and conveyed said property, and is not now the owner of same. However, pursuant to the provisions of chapter 175, Private Laws of North Carolina, 1907, kindergarten schools have been continuously maintained and operated in the city of Asheville, as a part of the public school system of said city. Children of residents of said city, between the ages of three and six years, have been admitted to and taught in said schools, without charge for tuition. The cost of maintaining and operating said schools has been paid out of the public school fund of the city of Asheville, without the levy of any special tax for that specific purpose.

At a special election held in the city of Asheville on 6 April, 1921, the question was submitted to the voters of said city as to whether an additional tax of 10 cents on the $100.00 valuation of property in said city should be levied and collected for the purpose of increasing the salaries of the teachers in the public schools of said city, and of paying the expense of the operation of said schools. At the date of this election, kindergarten schools were maintained and operated by the school authorities of the city of Asheville, as a part of the public school system of said city. At said election, the levy and collection of the additional tax was authorized by a large majority of the voters of said city.

The General Assembly of North Carolina, at its session held in 1923, enacted chapter 16, Private Laws of North Carolina, 1923, which is entitled "An act to amend, revise, and consolidate the statutes that constitute the charter of the city of Asheville." The corporate limits and boundaries of said city, as a municipal corporation, are defined in section 3 of said act. It is provided in section 4 that "the corporate powers of the city of Asheville shall be exercised as hereinafter provided by the board of commissioners and such other officers and agents as are hereinafter provided for, subject to such limitations as may be hereinafter imposed."

Included within said statute are sections relating to the public schools of the city of Asheville. Sections 125 to 139, inclusive. The effect of these sections is to constitute the city of Asheville a public school district for both white and colored children in the county of Buncombe. The board of commissioners of said city are charged with the duty of maintaining an adequate and sufficient system of public schools in said city, and to that end ample powers are conferred upon said board. With reference to kindergarten schools, the statute has the following sections:

"Section 130. Kindergarten Schools. The board of commissioners of the city of Asheville be and they are hereby authorized to take under their control, and make a part of the public schools of Asheville, all pupils of a minimum age of not less than three years, for the purpose of having them taught in kindergarten schools, a system of which shall be maintained in said city by said board, and to receive from the Asheville

Free Kindergarten Association, as a gift along with the taking over of the said kindergarten pupils, all lands, houses, schoolroom equipment, and other school property now owned and controlled by said Asheville Free Kindergarten Association, all of said property to be held in fee simple by said city as a part of the public school property of said city of Asheville."

"Section 130a. Conduct Kindergarten Schools. The board of commissioners shall maintain, support, carry on and conduct in said city, such free kindergarten schools as may, at all times, be necessary for the accommodation of such pupils as should properly be taught and trained in schools of this character. That said kindergarten pupils so taken under control shall become, and constitute a part of the public school population of the city of Asheville, and as such shall be entitled to all the rights, benefits, privileges and advantages of the public schools of said city, so far as their age and advancement will permit them to receive the same. The minimum age of three years herein allowed for the admission of said pupils, shall not apply to the general school population of the city, but only to the pupils composing the present kindergarten schools of the city of Asheville or to like schools or departments in schools of the city of Asheville, or like schools or departments in other schools which may hereafter be authorized by the said board."

The General Assembly of North Carolina, at its session held in 1929, enacted chapter 205, Private Laws of North Carolina, 1929, which is entitled "An act to extend the corporate limits of the city of Asheville." It is provided therein that this statute shall not become effective, unless the voters of the city of Asheville and of the territory to be annexed to said city by the proposed extension of said corporate limits, at a special election to be held as provided therein, shall approve such extension. At the election held pursuant to the provisions of said statute, the extension of the corporate limits of the city of Asheville was approved, and the statute thereby according to its terms became effective for all purposes. Section 10 of said statute provides that upon the approval by the voters of the extension of the corporate limits of the city of Asheville, it shall be the duty of said city, after said election and before 30 June, 1929, to "surrender the control of the present city of Asheville special charter school district to the board of education of Buncombe County, and that thereupon said special charter school district shall become a local tax district," and shall be governed as provided in said statute. Provision is made in the statute for a board of school committeemen of seven members, who are authorized to employ a superintendent and teachers for the public schools in said local tax district. It is expressly provided that "the public school system of the Asheville local tax district shall be under the supervision and control of the superintendent and the board of school committeemen herein appointed, it being intended by this section to direct that the present standard of education in the public schools of the city of Asheville shall be maintained."

It is further provided in said statute that "the present special school tax heretofore voted in the city of Asheville for the maintenance and operation of the public schools of the city and for the payment of principal and interest of school bonds heretofore voted, shall remain in full force and effect, but if the corporate limits of the city shall be extended as provided herein, the said special taxes shall be levied by the board of commissioners of Buncombe County in the same manner as special taxes are levied for other local tax districts under the present laws applicable to the same."

At a meeting of the defendant, the board of school committeemen of the city of Asheville, held on 14 March, 1930, by a resolution adopted by said board, it was ordered, upon the recommendation of the superintendent of the city schools, that the kindergarten schools, heretofore included as a part of the public school system of the city of Asheville, be discontinued at the expiration of the current school year. The discontinuance of said kindergarten schools was ordered for the purpose, as recited in said resolution, of saving the sum of $24,000. It does not appear in the statement of facts agreed whether or not the school fund available for the support of the public schools of the city of Asheville, for the ensuing year, will be, for any cause, decreased, nor does it appear whether or not the said fund derived in part from a special tax, levied pursuant to a special election heretofore held in the city of Asheville, will be insufficient to pay the expenses of maintaining the said public schools, including the kindergarten schools.

If it be conceded that the present board of school committeemen of the city of Asheville has the power to maintain and operate kindergarten schools, as part of the public school system of said city, in which children of residents of the city of Asheville, between the ages of three and six years, shall be taught and trained in accordance with the principles of education on which said schools are founded, we are of the opinion that it was error to hold that said board has discretion as to whether or not it shall exercise such power. The provisions of the statutes relative to the maintenance and operation of kindergarten schools in the city of Asheville, are by their terms mandatory. The predecessors of said board were required by such statutory provisions to maintain and operate such schools as a part of the public school system of the city of Asheville. These statutory provisions have not been repealed or modified by subsequent statutes now in force. They have been reënacted, and are now binding on the school authorities of the city of Asheville. It is expressly provided in the statute (chapter 205, Private Laws of North Carolina, 1929) from which the defendants herein derive their powers with respect to the public schools of the city of Asheville, that "the present standard of education in the public schools of Asheville shall be maintained." At the date of the enactment of this statute, the kindergarten schools were a part of the public school system of the city of Asheville, and their maintenance is required to maintain the standard of education then provided by the State and the city of Asheville for the children of said city. The present board of school committeemen of the city of Asheville has discretion as to the manner in which the power conferred upon it with respect to said schools shall be exercised, but it does not follow from this well-settled principle that it has discretion as to whether or not it shall exercise the power at all. Power is conferred upon said board in order that it may perform its duty, under the law, both to the State and to the city of Asheville.

In *Newton v. Highway Commission,* 192 N. C., 54, 133 S. E., 522, it is said by *Brogden, J.,* writing for the Court: "When a statute speaks plainly and in no uncertain or ambiguous terms, the voice of discretion cannot be heard; otherwise, administrative boards, under the guise of discretion, could set at naught the legislative will and clothe themselves with the attributes of sovereignty."

In *Cameron v. Highway Commission,* 188 N. C., 84, 123 S. E., 465, it is said by *Adams, J.,* writing for the Court: "We do not controvert the proposition that the defendants are clothed with certain discretionary powers; but as we interpret the act, these powers do not include the changing, altering, or discontinuing all roads in the exercise of a discretion, which can be reviewed only in case of oppression, or bad faith. We think the changing, the alteration, or the discontinuance by the defendants of the roads defined in the proviso of section 7 is subject to judicial review, without regard to the question of an abuse of discretion. The terms of the proviso are positive and mandatory, and not uncertain or discretionary."

Where power is conferred by statute upon an administrative board, with respect to matters committed to said board, and the exercise of such power is made mandatory, such board, although it may have discretion as to the manner in which the power shall be exercised, has no discretion as to whether it shall in good faith and in accordance with the legislative will, exercise the power. In the instant case, if the defendants have the power to maintain and operate kindergarten schools as part of the public school system of the city of Asheville, it is manifest, we think, that it is their duty to exercise the power, in good faith, and in accordance with the legislative will, clearly and plainly expressed in the statutes applicable to said schools.

The General Assembly of this State has by express statutory provisions conferred upon the board of school committeemen of the city of Asheville power to maintain and operate kindergarten schools, as a part of the public school system of said city, in which children between the ages of 3 and 6 shall be admitted as pupils. The question, therefore, presented for decision is whether these statutory provisions are valid, as being within the power of the General Assembly.

The General Assembly has the power which, we think, cannot be questioned, to prescribe by statute the subjects to be taught and the methods of instruction to be followed in the public schools of the State, whether such public schools be included within the uniform system required to be maintained by the Constitution, or whether they be public schools established for certain districts formed under the general school law of the State, or under special statutes. It also has the power to authorize and empower the school boards, or committees in charge of public schools to exercise this power. When thus authorized, a school board or committee may require that pupils in said schools shall be taught such subjects, or instructed in accordance with such methods, as distinguish kindergarten schools from other schools. This is undoubtedly true as to pupils between the ages of 6 and 21 years. Const., of N. C., Art. IX, sec. 2. Whether or not the General Assembly may by statute require a school board or committee to provide for the education of children in its district, under the age of 6 years, is an interesting question which has not heretofore been presented to this Court.

We are of the opinion, however, and so hold, that where schools have been established in a district and are maintained in accordance with the minimum requirements of the Constitution, and where provision has been made for the education of all children residing in the district, between the ages of 6 and 21, as required by the Constitution, and where the school fund available for the support of such schools, derived in part from local taxes lawfully levied and collected in the district, is sufficient for the maintenance of said schools, and also for the maintenance of kindergarten schools, in which children of the district, under the age of 6 years may be admitted as pupils, the General Assembly has power to require the school board or school committee of said district to provide and maintain such kindergarten schools, as a part of the public school system of the district. If, however, an additional tax is required to maintain such kindergarten schools, then they can be established and maintained only with the approval of the qualified voters of the district, to be determined by an election held pursuant to statutory authority. C. S., 5443.

In the instant case, it does not appear that the school fund available for the support of the public schools of the city of Asheville, derived in part from a special tax, levied and collected as authorized by the qualified voters of said city, will not be sufficient to maintain said schools in accordance with the requirements of the Constitution and also to maintain the kindergarten schools as part of the public school system of said city. We are, therefore, of opinion that there was error in the judgment approving, in effect, the order of the school board of the city of Asheville that the kindergarten schools be discontinued, at the expiration of the current school year. Plaintiffs are entitled upon the facts agreed to judgment as prayed for, enjoining the defendants from discontinuing the kindergarten schools, which are now by express statutory authority, a part of the public school system of the city of Asheville. In accordance with this opinion the judgment is

Reversed.

BESSIE PENLAND AND HER HUSBAND, J. L. PENLAND, v. FRENCH BROAD HOSPITAL, INC.

(Filed 20 August, 1930.)

1. **Trial D a—Where motion to nonsuit is not made at close of plaintiff's evidence denial of motion at close of all evidence is not appealable.**

   The allowance of a motion as of nonsuit is based upon purely statutory grounds, and the requirements of the statute, C. S., 567, must be strictly followed, and where the defendant fails to move for judgment as of nonsuit at the close of the plaintiff's evidence, his exception to the refusal of his motion therefor at the close of all the evidence is not sufficient to present on appeal the question of whether upon all the evidence the plaintiff is entitled to recover.

2. **Hospitals C a—Where surgeon is selected by patient or his agent, hospital is not liable for his alleged negligence.**

   Where the surgeon to perform an operation at a private hospital is selected by the plaintiff or by her personal physician with her or her husband's approval, the hospital in which the operation is to be performed agreeing to provide only the facilities for the operation, the hospital is not liable for the alleged negligence of the surgeon in the performance of the operation, and where in an action against the hospital the evidence fails to show that the surgeon was employed by the hospital or that the hospital selected or recommended the surgeon, a request for directed verdict that the plaintiff could not recover should be granted, and the fact that the surgeon was on the staff of the hospital or that he was a stockholder and officer of the hospital corporation does not vary the result.

APPEAL by defendant from *Harding, J.*, at January Special Term, 1930, of YANCEY. New trial.

Two actions, one by the plaintiff, Bessie Penland, and the other by her husband, the plaintiff, J. L. Penland, against the defendant, French Broad Hospital, Inc., a corporation organized under the laws of this State, pending in the Superior Court of Yancey County, were by consent consolidated for trial, and tried together at January Special Term, 1930, of said court.

The actions were begun by the plaintiffs therein to recover damages sustained by them, respectively, resulting from a surgical operation performed on the plaintiff, Bessie Penland, by which her appendix was removed. The said operation was performed in the hospital owned and maintained by the defendant corporation, in the city of Asheville, N. C.

In the complaint in the action begun by the plaintiff, Bessie Penland, she alleges:

"3. That prior to the late summer or early fall of 1927, the plaintiff, who was then 23 years of age, and the mother of three healthy children, was in most excellent health and physical condition, until along about such time she became stricken with appendicitis, and after conferences with her husband, and her local physician, she was removed to the hospital of the defendant, in the city of Asheville, North Carolina, for an operation to remove the appendix, and for the treatment involved in such removal operation.

"4. That she was so removed to the hospital of said defendant and arrangements made with the proper officials and authorities in control thereof for the purpose of obtaining said operation and treatment, and placed entirely in the custody of the officials of said corporation who agreed to take the responsibility therefor, and to perform an operation for such purpose and to properly treat the plaintiff in relation thereto.

"5. That the plaintiff submitted herself to the custody and attention of said corporation, through its physicians and officials, and was operated upon by a physician or surgeon, or by physicians and surgeons furnished by the said corporation for such purpose, and after said operation and treatment, for a term of three weeks, she remained in said hospital under the direction and sole care of its physicians and surgeons, officers and attendants.

"9. That in the performance of the operation for appendicitis, the defendant, with gross and almost criminal negligence, as the plaintiff is informed and believes, neglected to remove packing which had been placed by the operatives of the defendant in the wounds created by them, and continued to allow the same to remain, notwithstanding the plaintiff's repeated returns to its hospital for treatment, and said packing continued to remain for a period covering seven months after its placing therein."

In the complaint filed in the action begun by the plaintiff, J. L. Penland, he alleges:

"3. That in the year 1927, the plaintiff, being temporarily engaged in labor near Asheville, North Carolina, found that his wife, who was at her home in Yancey County, was ill with appendicitis and upon the advice of a physician, brought his wife, Bessie Penland, to the hospital of the defendant, in Asheville, North Carolina, for an operation for appendicitis.

"4. That the plaintiff placed his said wife in the hospital of the defendant, under its complete care and direction, and trusted the said defendant to provide skilled operatives to remove the appendix of his wife, which operation the plaintiff is advised, was comparatively simple, when properly performed, and that an early recovery should follow—and there should be no serious danger, harm or suffering.

"5. That the defendant undertook said operation and reported the same as having been completely performed, and without complications or injury to his wife, and discharged his said wife from said hospital after three weeks.

"6. That the defendant, with gross negligence and carelessness, unnaturally mutilated the wife of the plaintiff, cutting or allowing the instrument to penetrate and injure some of the most important or vital organs of his said wife, and with gross negligence and carelessness allowed packing to remain in her wounds, so that for a period of seven months the packing was not found, and was allowed to remain in her, causing repeated openings, wounds, unnatural means of bringing about evacuation, and action of the kidneys and bowels, and causing permanent injury and complete destruction of her health."

Both plaintiffs allege that as the result of the negligence of the defendant, as alleged in their respective complaints, each sustained damages in a large sum, for which each demands judgment against the defendant.

The defendant in its answer to the complaint in each of said actions, denied all the material allegations therein, and prayed judgment that the plaintiff take nothing by said action, and that it recover its costs.

The issues submitted to the jury at the trial were answered as follows:

"1. Was the plaintiff, Bessie Penland, injured and damaged by the negligence of the French Broad Hospital, Inc., as alleged in the complaint? Answer: Yes.

2. Was the plaintiff, J. L. Penland, injured and damaged by the negligence of the French Broad Hospital, Inc., as alleged in the complaint? Answer: Yes.

3. What damages, if any, is the plaintiff, Bessie Penland, entitled to recover of the defendant, the French Broad Hospital, Inc.? Answer: $10,000.

4. What damages, if any, is the plaintiff, J. L. Penland, entitled to recover of the defendant, the French Broad Hospital, Inc.? Answer: $70.00."

From judgments on the verdict, that plaintiff, Bessie Penland, recover of the defendant the sum of $10,000, and that the plaintiff, J. L. Penland, recover of the defendant, the sum of $70.00, the defendant appealed to the Supreme Court.

G. D. Bailey and Pless & Pless for plaintiffs.
Thomas S. Rollins and Harkins & Van Winkle for defendant.

CONNOR, J. The case on appeal settled by the judge, upon disagreement of counsel, and certified to this Court on defendant's appeal, C. S., 644, does not show that at the close of the evidence for the plaintiffs, defendant moved for judgment dismissing the action as of nonsuit, C. S., 567. When plaintiffs rested their case, defendant introduced evidence, and at the close of this evidence, plaintiffs introduced evidence in rebuttal. At the close of all the evidence, as shown by the case on appeal, defendant moved for judgment dismissing the action as of nonsuit "upon the ground that in no view of the evidence, if believed, are the plaintiffs, or either of them entitled to recover in this action." This motion was denied and defendant excepted. The assignment of error based on this exception cannot be considered by this Court. It is expressly provided by the statute, C. S., 567, that when the plaintiff has introduced his evidence, and rested his case, the defendant may move to dismiss the action or for judgment as in case of nonsuit. It is only when this motion has been overruled, and defendant has excepted, and thereafter introduced evidence, that he may, at the close of all the evidence, again move to dismiss the action. If this motion is denied, and defendant excepts, he has the benefit of this exception on his appeal to this Court. In the absence of a motion to dismiss at the close of the evidence for the plaintiff, and an exception to the denial of such motion, an exception to the denial of a motion by the defendant, who has thereafter introduced evidence, at the close of all the evidence, is not sufficient to present to this Court, on defendant's appeal, the question as to whether upon all the evidence, the plaintiff is entitled to recover. The power of the Superior Court to grant an involuntary nonsuit is altogether statutory. *Riley v. Stone*, 169 N. C., 421, 86 S. E., 348. The provisions of the statute must be complied with, strictly, in order that defendant may have the benefit of its provisions. Upon this principle it has been uniformly held by this Court, since the enactment of the statute by the General Assembly in 1897, that an exception to the denial of a motion by defendant to dismiss the action, made at the close of the evidence for the plaintiff, is waived when the defendant thereafter introduces evidence. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Gilland v. Stone Co.,* 189 N. C., 783, 128 S. E., 158; *Wooley v. Bruton,* 184 N. C., 438, 114 S. E., 628; *Bordeaux v. R. R.,* 150 N. C., 528, 64 S. E., 439. The defendant's failure to renew the motion to dismiss, at the close of all the evidence, deprives him of the right to present to this Court, on his appeal, his contention that there was error in the denial of his motion at the close of the evidence for the plaintiff, or at the close of all the evidence. So, where defendant has not moved at the close of plaintiff's evidence to dismiss the action, he cannot by such motion at the close of all the evidence, avail himself of the provisions of the statute.

The defendant in this action, however, at the close of all the evidence, and in apt time, C. S., 565, requested the court, in writing, to instruct the jury as follows:

"1. That in no view of the evidence are the plaintiffs, or either of them, entitled to recover, and therefore, the jury is instructed to answer the first issue 'No,' and that they need not answer the other issues.

"2. That the burden of all the issues is on the plaintiffs, and the court charges that there is no evidence that the defendant hospital performed the operation on the plaintiff, Bessie Penland, or that the hospital selected the surgeon or surgeons who operated on her, and therefore, the jury will answer the first issue, 'No.'"

To the refusal of the court to give these instructions, the defendant excepted, and on its appeal to this Court assigns such refusal as error, for which it is entitled to a new trial.

By its assignments of error based on its exceptions to the refusal of the court to give these instructions, the defendant presents to this Court its contention that, conceding there was evidence from which the jury could find that the surgeon or surgeons who performed the operation on the plaintiff, Bessie Penland, by which her appendix was removed, were negligent as alleged in the complaints, there was no evidence tending to show, or from which an inference could reasonably be drawn, that said surgeon or surgeons performed the operation as agent or employee, or as agents or employees of the defendant corporation, as alleged in the complaints.

All the evidence tended to show that prior to the performance of the operation, the plaintiffs, Bessie Penland and her husband, J. L. Penland, were advised by her physician that she was suffering with appendicitis, and that an operation for the removal of her appendix was necessary to give her relief; that acting upon the advice of her said physician, plaintiff agreed that the said Bessie Penland should be taken to the hospital of defendant for said operation; that the operation was performed in said hospital by a surgeon selected and employed for that purpose, with the consent of plaintiffs, by the physician, who was attending the plaintiff, Bessie Penland. There was no evidence tending to show that said surgeon was employed or paid by the defendant corporation for said operation, or that defendant selected or recommended said surgeon as possessing the skill or professional qualifications required for the performance of the operation. The fact that the said surgeon was on the "staff" of the hospital, or that he was a stockholder and officer of the defendant corporation, did not show or tend to show that he was the agent of or was employed by the defendant. Any physician or surgeon practicing his profession in the city of Asheville, was qualified to become a member of the "staff" of said hospital, and to perform operations or treat his patients in said hospital. All the evidence tended to show that the defendant undertook only to provide facilities for the performance of the operation, and for the treatment of plaintiff, Bessie Penland, while she was recovering from the operation. There was no evidence tending to show that the defendant undertook to furnish or did furnish a physician or surgeon to perform the operation, or to care for the plaintiff while she was recovering from its effect. During the operation, and at all times subsequent thereto, she was under the care and treatment of physicians and surgeons chosen and employed by her husband, or at his request and with his consent, by her physician. Conceding that there was evidence from which the jury might infer that the surgeon who performed the operation negligently permitted gauze or packing to remain in the wound made by him in the performance of the operation *(McCormick v. Jones,* 152 Wash., 508, 278 Pac., 181, 65 A. L. R., 1019) we find no evidence from which the jury could find that defendant was liable for such negligence.

In *Pangle v. Appalachian Hall,* 190 N. C., 833, 131 S. E., 42, it is said by this Court that "there can be no question about the liability of a privately owned or corporate hospital, conducted for individual gain, and not for charitable purposes, for damages to its patients resulting from negligence attributable to the agents of such hospital. *Young v. Gruner,* 173 N. C., 622, 92 S. E., 618; *Green v. Biggs,* 167 N. C., 417, 83 S. E., 553." This principle, however, is not determinative of the right of plaintiffs to recover on this action.

In *Johnson v. Hospital,* 196 N. C., 610, 146 S. E., 573, it is said: "In the case at bar the action for damages is brought solely against the corporate defendant, and not against the surgeon who, it is alleged, negligently injured the plaintiff. It is a well recognized rule of law that corporations are liable for the negligent, wilful or malicious torts of their servants or agents, when acting within the course and scope of their employment. *Ange v. Woodmen,* 173 N. C., 33, 91 S. E., 586; *Cotton v. Fisheries Co.,* 177 N. C., 56, 97 S. E., 712; *Clark v. Bland,* 181 N. C., 110, 106 S. E., 491; *Sawyer v. Gilmers,* 189 N. C., 7, 126 S. E., 183; *Kelly v. Shoe Co.,* 190 N. C., 406, 130 S. E., 32. The ultimate inquiry then, is whether or not Dr. Sloan, in treating the plaintiff, was acting as the servant or agent of the hospital corporation and within the course and scope of his employment. Clearly the corporation would not be liable for the negligent acts of its officers, merely because they were officers."

The facts in the instant case, as shown by all the evidence, are almost identical with those in *Johnson v. Hospital, supra,* and in accordance with our decision in that case, defendant's assignments of error based upon its exceptions to the refusal of the court to give the instructions prayed for, are sustained.

The owner of a hospital, whether an individual, firm or corporation, is not liable for damages resulting from a surgical operation, or from treatment, medical or otherwise, in said hospital, where the surgeon who performed the operation or the physician who treated the patient, was employed by the patient or by some one other than such owner, and the damages resulted from the negligence of such surgeon or physician. The owner of the hospital, when the hospital is conducted for his, their or its gain, and not for charitable purposes, is liable for such damages when they result from injuries caused by the negligence of such owner, or by the negligence of his, their or its agents, servants or employees acting within the scope of their employment. When the owner of the hospital undertakes only to furnish the facilities for the operation, or for the treatment of the patient, and the patient selects and employs the surgeon who operates on or the physician who treats the patient, such owner, although he, they or it charges for the use of the facilities furnished, is not liable for damages resulting solely from the negligence of the surgeon or physician.

"A private hospital is not responsible for any default on the part of an operating surgeon who practices his profession as an independent agent. Where a patient employs a surgeon not in the employ of the hospital, the hospital is not liable for his negligence, although the surgeon is an officer and stockholder of the hospital corporation." 30 C. J., 467. In support of the text, the author of the article entitled "Hospitals," cites *Barfield v. South Highlands Infirmary,* 191 Ala., 553, 68 So., 30, Anno. Cas., 1916C, 1097, in which it was held that where the medical and surgical treatment of a patient in an infirmary and an operation were prescribed and performed by a surgeon under an independent employment by the patient, the infirmary corporation was not liable for his negligence, unskillfulness or other wrong, though he was a shareholder and officer of the corporation.

It is unnecessary to discuss or to decide other assignments of error on this appeal based upon exceptions to the admission of evidence offered by the plaintiffs. For error in the refusal to give the instructions prayed for by defendant, the judgments are reversed.

New trial.

STATE v. HUZY JACKSON, ALIAS JIMMY CADOGER, ALIAS JIMMY CADOZIER.

(Filed 20 August, 1930.)

1. **Rape C b—Evidence of defendant's identity as person who committed crime held sufficient to be submitted to the jury.**

In a prosecution for rape where the prosecutrix positively identifies the defendant as the one who was guilty of the offense, there being ample evidence of the commission of the crime, and the defendant introduces contradictory evidence tending to prove an alibi, and the testimony of each is corroborated by other evidence, the credibility of the evidence is essentially for the jury, and under a trial free from error their verdict of guilty will be sustained on appeal.

2. **Criminal Law L g—Failure of court to charge that evidence introduced for restricted purpose be so considered by jury not error in absence of request.**

Where evidence is introduced only for the purpose of corroboration, and at the time of its introduction the court instructs the jury that it was to be considered only for that purpose and not as substantive evidence, his failure to likewise so instruct them in his charge is not reversible error in the absence of a request for an instruction to that effect. Rules of Practice in the Supreme Court No. 21.

3. **Criminal Law I l—In this case held: failure to instruct jury that defendant might be convicted of lesser degree of crime not error.**

Where all the evidence tends to show that the crime of rape was committed as alleged in the bill of indictment, and the defendant relies solely upon an alibi, and does not contend that he might be found guilty of a lesser degree of the crime, and introduces no evidence to that effect, and makes no request that the court instruct the jury thereon, the failure of the court to so instruct the jury will not be held for error, C. S., 4639, 4640, not applying.

4. **Criminal Law I g—In this case held: court did not express opinion as to weight and credibility of evidence.**

The use of the words "the evidence tends to show" by the trial court in his charge to the jury, applied both to the evidence for the State and for the defendant, is not an expression by him upon the weight and credibility of the evidence forbidden by C. S., 564.

5. **Criminal Law J d—Motion for new trial in criminal case for newly discovered evidence is addressed to discretion of court.**

Defendant's motion for a new trial in a criminal prosecution on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and the refusal of the motion is not reviewable on appeal.

6. **Rape C a—Indictment in this case held sufficient, and motion in arrest was properly denied.**

The refusal by the court of the defendant's motion in arrest of judgment on the ground that the indictment was fatally defective, made after verdict of guilty of the crime of rape, will not be held for error on appeal where the alleged defects are the failure of the indictment to describe the prosecutrix as a "female" and to allege that the crime was committed "by force," the indictment alleging that the defendant "with force and arms . . . in and upon C. . . . violently and feloniously did make an assault, and . . . violently and against her will," etc.

7. **Criminal Law K c—Judgment in capital case must be written and signed by trial judge.**

The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of C. S., 4659, its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded.

BROGDEN, J., concurring; CLARKSON, J., concurring in concurring opinion.

APPEAL by defendant from *Stack, J.,* at September Term, 1929, of ROWAN.

No error in the trial; remanded for judgment on the verdict in accordance with the provisions of C. S., 4659.

This is a criminal action in which the defendant was tried on his plea of not guilty to an indictment returned by the grand jurors for the State, at September Term, 1929, of the Superior Court of Rowan County, charging that defendant "on 27 July, A. D. 1929, with force and arms, in the county aforesaid, in and upon Mrs. W. H. Canup, in the peace of God and the State, then and there being, violently and feloniously, did make an assault, and her the said Mrs. W. H. Canup, then and there violently and against her will, feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

There is a count in the indictment also charging that defendant, on said day, and in said county, "in and upon the said Mrs. W. H. Canup, a female in the peace of God and the State, then and there being, unlawfully, violently and feloniously did make an assault with intent to commit rape upon the body of her, the said Mrs. W. H. Canup, and with intent her, the said Mrs. W. H. Canup, violently by force and against her will, then and there, feloniously to ravish and carnally know, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

There was a verdict that defendant is guilty of rape.

From judgment that defendant suffer death by means of electrocution, as provided by statute, C. S., 4657, defendant appealed to the Supreme Court, assigning errors in the trial, and also error in the judgment.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

T. L. Kirkpatrick and B. G. Watkins for defendant.

CONNOR, J. There was evidence at the trial of this action, offered by the State and submitted to the jury by the court, without objection by the defendant, sufficient in its probative force to sustain the verdict that defendant is guilty of rape, as charged in the indictment. This evidence was sufficient to show not only that the crime of rape was committed as alleged in the indictment, but also that the defendant is the man who committed the crime, as is also alleged therein.

The evidence offered by the defendant, and also submitted to the jury by the court, tending to show that defendant is not the man who committed the crime of rape, which all the evidence tended to show was committed as alleged in the indictment, was sufficient in its probative force to sustain the contention of the defendant that he is not guilty. This evidence tended to contradict the testimony of the prosecutrix, identifying the defendant as the man who committed the crime and also tended to show that defendant, at the time the crime was committed, was not present, but was elsewhere. There was evidence tending to corroborate both the prosecutrix as a witness for the State, and the defendant, as a witness in his own behalf.

The credibility of the conflicting testimony as to the identity of the defendant as the man who committed the crime, was essentially a matter for the jury. In her testimony at the trial, the prosecutrix positively and without equivocation identified the defendant as her assailant. On the other hand, the defendant testified that at the time the State contended the crime was committed, he was at a place some five or six miles from the scene of the crime. If the jury found the facts to be as the evidence for the State tended to show, and so found beyond a reasonable doubt, as their verdict shows they did, the only verdict which they could have returned, was that defendant is guilty of rape. If, however, the jury had accepted the testimony of the defendant as true, or if the jury, upon consideration of all the evidence, had had a reasonable doubt as to the identity of defendant as the man who committed the crime, they should, and under the charge of the court, they would have returned a verdict of not guilty. In its charge to the jury, the court fully and correctly instructed them in accordance with these principles.

Defendant's objections to certain evidence offered by the State for the purpose of corroborating the prosecutrix, as a witness for the State, were properly overruled. At the time this evidence was admitted, the court instructed the jury that the evidence was not substantive evidence, but was offered only for the purpose of corroborating the testimony of the prosecutrix, and should be considered by the jury only for that purpose. In the absence of a prayer that the court instruct the jury, in its charge, that this evidence was only for the purpose of corroborating the prosecutrix, and should not be considered by the jury as substantive evidence tending to prove the facts involved in the issue to be as contended by the State, there was no error in the failure of the court to so instruct the jury in its charge. The rule to the contrary in accordance with which a new trial was ordered in *S. v. Parker,* 134 N. C., 209, 46 S. E., 511, has been superseded by Rule 21, Rules of Practice in the Supreme Court of North Carolina, 192 N. C., at page 849. The rule now is that "when testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge failed in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground for exception that evidence competent for some purposes but not for all, is admitted generally, unless the appellant asks, at the time of admission that its purpose shall be restricted."

At the trial of this action, there was no request by the defendant that the court instruct the jury that under the indictment upon which defendant was on trial, if the jury should fail to find that defendant is guilty of rape, as charged in the indictment, or that he is guilty of an assault with intent to commit rape, as is also charged therein, they could, in accordance with the provisions of C. S., 4639 and C. S., 4640, return a verdict that defendant is guilty of an assault with a deadly weapon, or of an assault upon a female, or of a simple assault. It is apparent from the record that no contention to this effect was made by the defendant or in his behalf at the trial, for the reason that all the evidence, if believed by the jury, showed that the crime of rape was committed as alleged in the indictment. No contention to the contrary was made by the defendant, on his cross-examination of the prosecutrix, or of the witnesses for the State. He offered no evidence in support of such contention. For his defense, defendant relied solely upon an alibi. *S. v. Williams,* 185 N. C., 685, 116 S. E., 736, where it was held that the refusal of the trial judge to give the instruction requested by the defendant in that case, does not sustain the contention of the defendant in the instant case, that there was error in the failure of the court to so instruct the jury. Where all the evidence at a trial upon an indictment for rape shows that the crime was committed, as alleged in the indictment, and the defendant makes no contention to the contrary, but for his defense relies solely upon an alibi, the principle upon which a new trial was ordered in *S. v. Williams, supra,* does not apply. C. S., 4639 and C. S., 4640, are applicable only where there is evidence tending to show that defendant is guilty of a crime of lesser degree than that charged in the indictment. See *S. v. Hardee,* 192 N. C., 533, 135 S. E., 345, *S. v. Holt,* 192 N. C., 490, 135 S. E., 324, *S. v. Allen,* 186 N. C., 302, 119 S. E., 504.

The contention of the defendant that by the use of the words "tends to show," in referring to the evidence offered by the State, in his charge to the jury, the trial judge violated the provisions of C. S., 564, cannot be sustained. The judge used the identical words in referring to the evidence offered by the defendant. He did not thereby give an opinion either as to the credibility or as to the probative force of the conflicting evidence, which he was stating to the jury as he was required to do by the statute. In his charge to the jury in *Lewis v. R. R.,* 132 N. C., 382, 43 S. E., 919, the judge, referring to the substance of the testimony of certain witnesses, used the expressions, "the evidence tends to show," and "evidence tending to show." On defendant's appeal to this Court, it was contended that this was error. The contention was not sustained. In the opinion in that case, it is said: "We see no valid objection to the expressions complained of. They do not imply an opinion on the part of the judge that any fact was fully or sufficiently proved."

After full and careful consideration of his assignments of error relied upon by defendant on his appeal to this Court, and based upon his exceptions to the rulings of the court upon his objections to evidence offered by the State, and upon his exceptions to instructions of the court to the jury, in the charge, we fail to find any error for which defendant is entitled to a new trial. The verdict is supported by evidence offered by the State, and submitted by the court to the jury under a charge which is free from error. It is true, as earnestly contended by his counsel, that the evidence offered by defendant in support of his defense based upon an alibi, is of such character, as to justify their efforts in his behalf, both at the trial and on the appeal to this Court. We find nothing, however, in the record certified to this Court, on defendant's appeal, to sustain the contention of defendant's learned and diligent counsel that he has not had a fair trial in accordance with the laws of this State. We cannot, therefore, in the exercise of our jurisdiction as an Appellate Court, hold that defendant is entitled to a new trial for errors committed by the trial judge during the trial which has resulted in the verdict that defendant is guilty of rape. We find no error in the trial, and, therefore, we cannot order that the verdict be set aside.

After the verdict was returned, and before judgment was rendered, the defendant moved in the court below for a new trial, contending that after the verdict was returned he had, by the aid of his counsel, discovered evidence, which supported his contention that he was not at the home of the prosecutrix, when the crime was committed, and which contradicted the testimony of a witness for the State, which was offered at the trial as tending to show that he was the man who committed the crime. Defendant's counsel in support of their motion offered affidavits of persons whose testimony was relied upon as the newly discovered evidence. The judge in his discretion denied defendant's motion, and defendant excepted. The assignment of error based on this exception cannot be sustained. A motion made before the trial judge in the Superior Court, after the trial of the issue in a criminal action, resulting in a verdict of guilty, for a new trial on the ground of "newly discovered evidence," is addressed to the discretion of the trial judge, and his action upon the motion will not be reviewed on defendant's appeal to this Court, except in a case showing gross abuse of the discretion vested in him. Upon consideration of the affidavits appearing in the record, showing the nature of the evidence which defendant's counsel discovered after the verdict was returned, we cannot hold that the learned judge abused his discretion when he refused to allow defendant's motion. Upon authoritative decisions of this Court, we must decline to review the action of the judge, refusing to grant a new trial on the ground of newly discovered evidence. The judge made no findings of fact upon which he ruled adversely to defendant, but conceding that the facts are as stated in the affidavits, we cannot hold that there was error in the refusal of the judge to allow the motion. In *S. v. Trull,* 169 N. C., 363, 85 S. E., 133, it is said: "The refusal of the court to grant a new trial for newly discovered testimony rested in his discretion, and is not reviewable. *S. v. Jimmerson,* 118 N. C., 1173, 24 S. E., 494, *S. v. DeGraff,* 113 N. C., 690, 18 S. E., 507, *S. v. Morris,* 109 N. C., 821, 13 S. E., 877. The findings of fact by the court are not reviewable. *S. v. DeGraff, supra, S. v. Morgan,* 120 N. C., 563, 26 S. E., 634, *S. v. Lance,* 109 N. C., 789, 14 S. E., 110; *S. v. Dunn,* 95 N. C., 697." See, also, *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629, where it is said: "It is the settled rule of practice with us, established by a long and uniform line of decisions, that new trials will not be awarded by this Court in criminal prosecutions for newly discovered evidence. *S. v. Williams,* 185 N. C., 643, p. 664, 116 S. E., 570, *S. v. Jenkins,* 182 N. C., 818, 108 S. E., 767, *S. v. Lilliston,* 141 N. C., 857, 54 S. E., 427, and cases there cited. Such motions may be entertained in the Superior Court, at least during the term at which the case was tried, and allowed or not, in the discretion of the presiding judge, and ordinarily, the action of the trial court and his findings of fact on such motion are not subject to review on appeal."

Defendant's motion in arrest of judgment made in the Superior Court, after the return of the verdict, for that the indictment was fatally defective was denied. In this there was no error. The defects alleged are the failure to describe the prosecutrix as a "female" and to allege that the crime was committed "by force." The contention made on behalf of the defendant in this case is identical with that made in *S. v. Laxton,* 78 N. C., 564. The decision in that case is an authority supporting the refusal of the court in the instant case to allow the motion in arrest of judgment. The decision in *S. v. Marsh,* 132 N. C., 1000, 43 S. E., 828, cited and relied upon by defendant is not applicable. This is readily apparent upon a comparison of the indictment in that case with the indictment in the instant case.

It appears from the record on this appeal that the judgment of the court was entered on the minutes by the clerk, and that the minutes were thereafter signed by the judge. The judgment is as follows: "It is ordered by the court that the defendant be conveyed by the sheriff of this county to the State Prison at Raleigh, and there delivered to the warden of the State Prison and the warden is ordered to cause sufficient electricity to pass into the body of said defendant to cause his death, and this shall take place between the hours of 10 a.m. and 2 p.m., on 30 October, 1929." It does not appear that the judgment of the court on the verdict of the jury was in writing, or that said judgment was filed in the papers in the case against the defendant, to the end that a certified copy thereof might be transmitted by the clerk to the warden of the State Penitentiary at Raleigh, North Carolina, as his authority to execute the judgment. The requirements of the statute (C. S., 4659) are mandatory and we cannot hold that the statutory provisions have been complied with in this case. We, therefore, order that this action be remanded to the Superior Court of Rowan County that a judgment may be rendered by said court in compliance with the statute. The requirements of the statutes by virtue of which this defendant must suffer death by means of electrocution, as the punishment prescribed by law for the crime committed by him, as found by the jury, must be strictly observed.

We think it but just to the defendant to say that there was no evidence at the trial of this action tending to show that the defendant had at any time represented that his name was "Jimmy Cadoger" or "Jimmy

Cadozier." When he was arrested, he informed the officers, to whom he was a stranger, that his name was "Huzy Jackson." He testified, without contradiction, that he had never been called either "Jimmy Cadoger" or "Jimmy Cadozier." A witness for the State, whose testimony was sharply contradicted by the defendant, and who testified that he saw the defendant near the home of the prosecutrix a short time before the crime was committed, had informed the officers that the name of the defendant was "Jimmy Cadoger" or "Jimmy Cadozier." There was evidence tending to show that this witness knew a man, who lived in South Carolina, whose name was "Jimmy Cadoger" or "Jimmy Cadozier." Defendant contended that this was the man, and not the defendant, whom the witness saw near the home of the prosecutrix, a short time before the commission of the crime. The jury, however, failed to sustain this contention.

We find no error in the trial, but in accordance with this opinion, and for the purpose stated therein, the action is

Remanded.

BROGDEN, J., concurring: It is suggested in the brief of the defendant that he could have procured other evidence in support of his motion for a new trial upon newly discovered evidence, but was prevented from so doing by lack of time. The opinion of this Court remands the "action" for judgment. Hence there is no final judgment and it may be that the rights of the defendant to renew his motion in the trial court, before judgment, are not precluded or destroyed. *Allen v. Gooding,* 174 N. C., 271.

CLARKSON, J., concurs herein.

STATE v. ALFRED HOFFMAN, LAWRENCE HOGAN, DELL LEWIS AND WES FOWLER.

(Filed 20 August, 1930.)

1. **Riot A a—Elements of offense of riot.**

The offense of riot is composed of the three elements of unlawful assembly, intent to mutually assist against lawful authority, and acts of violence: and *Held*, the evidence in this case plainly and unequivocally discloses the essential ingredients of the offense.

2. **Riot C b—Evidence of defendants' guilt of aiding and abetting in riot held sufficient to be submitted to the jury.**

Evidence in a prosecution for riot tending to show that one of the defendants was a leader of strikers of a mill, and that he incited and brought several automobile loads of strikers to the scene of the riot who were armed with sticks and joined the crowd and participated in the disturbance, and that the other defendants incited the members of the crowd and actively participated in the ensuing fight, with evidence to the contrary that the tumult resulted from acts of violence by the officers, and that the defendants were acting as peacemakers therein: *Held,* the evidence creates an issue of fact as to the defendants' guilt as aiders and abettors in the offense which was properly submitted to the jury for its determination.

3. **Same—Evidence of inflammatory speech of one of defendants held competent in connection with evidence of his participation in the riot.**

Evidence of the declaration of one of the defendants on trial for the offense of riot, made some weeks before the disturbance, of an inflammatory and threatening nature, is held competent against him in connection with evidence of his participation in the disturbance.

4. **Criminal Law C b—Party inciting, encouraging, or assisting the actual perpetration of a crime is guilty as aider and abettor.**

Mere presence, even with the intention of assisting in the commission of a crime, does not render a party an aider or abettor therein unless the intention to assist is communicated to the perpetrator, but if a party, being present, does something that will incite, encourage, or assist the actual commission of a crime he is guilty as an aider and abettor.

CRIMINAL ACTION, before *Cowper, Special Judge,* at November Term, 1929, of McDOWELL.

The defendants, Hoffman, Fowler, Hogan, Russell, Lewis and Hall were indicted upon a bill containing four counts. The first count charged engaging in a riot; the second count charged resisting the sheriff of McDowell County in the performance of his duties; the third count charged resisting the deputy sheriff of McDowell County while in the discharge of his duties, and the fourth count charged resisting the constable of Marion Township, McDowell County, while in the performance of his duties.

The jury convicted Hoffman, Hogan, Fowler and Lewis. By the judgment entered, Hogan, Fowler and Lewis were ordered to be confined in the common jail of McDowell County for a period of six months and assigned to work on the public roads. Hoffman was sentenced to jail for a period of thirty days and fined the sum of $1,000 and costs.

The verdict as shown by the record is as follows: "The jury returned a verdict of guilty as to all four of the defendants on the count in the bill charging them with rioting and not guilty as to all other counts in the bill. The jury recommends the mercy of the court."

The names of the four defendants convicted do not appear in the verdict at all. The judgment is pronounced against Hogan, Fowler, Lewis and Hoffman. Hence we assume that the other two defendants were acquitted.

The evidence tended to show that there was a strike in progress among the workmen of the Clinchfield Mill and other mills in Marion, North Carolina. On 30 August, 1929, a man named Ruppe came from Caroleen, Rutherford County, to work in the mill. He brought his furniture with him and at the instance of officials of the mill placed his furniture in a house belonging to the Clinchfield Mill. This house is situated near Highway No. 10, which is commonly referred to as the main street of North Carolina, running from the ocean to the mountains. The mill road branches off from No. 10, and the house in which Ruppe moved his furniture was about 300 yards from said highway. Ruppe left his furniture in the house and the house was closed. He then returned to his home in Rutherford County. That afternoon about three o'clock it was discovered by the officials of the mill that the house had been broken into and the furniture dumped out on Highway No. 10 at a point at or near the mouth of the mill road. "It was just on the edge of the concrete and against the bank." Officials of the mill called the sheriff of McDowell County to put the furniture back in the house. Sheriff Adkins took with him his deputies, Hendley, Tate, Gowan and Halliburton, and also Robbins, the constable of Marion Township. Arriving upon the scene and at the place where the furniture was lying in the road, the sheriff and his deputies found 75 or 100 people standing on Highway No. 10 at the mouth of the mill road, blocking the same. As soon as the sheriff and his deputies appeared the crowd surged about them. The defendants, Fowler and Lewis, were in this surging crowd and surged with them. Fowler had an open knife in his hand and Lewis was armed with a stick 2½ by 3 feet long. Eighty per cent of the people in the crowd who were blocking the road had sticks.

The sheriff secured a wagon and a driver from the mill, loaded the furniture on it and attempted to carry it back to the house from which it had been taken. When the furniture had been loaded Fowler approached the sheriff and said, "What in the hell are you going to try to do now?" At that time Fowler had an open knife in his hand. The sheriff grabbed at Fowler's hand and he jerked the knife back and put it in his pocket. Thereupon the sheriff arrested Fowler and placed him in a car in charge of deputies Hendley and Gowan and told them to drive through the crowd. Fowler kept pulling back, "saying he hadn't done anything." In the meantime the crowd had increased to about 200, blocking the entire road and "hollering and cursing," and saying "They are not going to get through this crowd." The road leading into the village was blocked. When the sheriff's car in which Fowler had been placed began to move through the crowd the sheriff walked behind it and ordered the wagon loaded with furniture to follow him. Thereupon the crowd closed together and when the team started they proceeded "to beat the mules and throw rocks at the driver. They hit the mules with sticks, threw rocks at the driver and cursed. . . . They were hollering, 'Damn scabs are not coming in. We are not going to let them come in and everybody hold your ground.' They shouted to the sheriff that he had no damn business down there and that he had better get the hell away from there; they were not going to let that stuff go in." The sheriff kept telling them they had better stand back and let the team through, as they had no right to block the highway. At this time the defendant Hogan appeared upon the scene and began conferring with the crowd going "from group to group." After Hogan was there talking to the crowd they continued to keep the road blocked, hollering. At this time the crowd had increased to about 300. When the sheriff's car, carrying the defendant Fowler to jail, was passing through the crowd they beat on the car several times. A milkman named Houk came along the road to deliver milk to his customers. He saw the sheriff and his deputies near the mouth of the road. He was stopped by two men armed with sticks. When he attempted to pass through the crowd "they began beating on my truck." The defendant Hogan was present at that time and the crowd around him had sticks. The crowd was yelling and hollering and cursed the milkman, or as he testified: "Called me all kinds of stuff, scabs and everything of that kind; I couldn't say, was so much hollering and yelling, couldn't tell what they were all saying."

Seeing that he and his deputies were overpowered and that the road was thoroughly blocked by the surging crowd and that it would be impossible to move the furniture, the sheriff called for troops then stationed in Marion. Before the arrival of the troops the defendant Hoffman appeared upon the scene. The sheriff testified: "I saw Mr. Hoffman's car drive up to the switch down there two or three times, I think three times, and bring a load of folks and get out of his car and come and join the crowd. I couldn't say how many people he brought in his car, three, four or five times. It is a Buick coupe. Those people had sticks, lots of them; when they got out of his car they would go down in the crowd with their sticks. It was a regular turmoil. They were hollering, everybody was hollering and cursing, and ever once and a while a rock would ziz by you." Just as the troops came in sight the defendant Hogan came into the crowd and the crowd began yelling. Hogan said something to the crowd and part of the crowd in front began to put their sticks on their shoulders and began to march up and down in front of the crowd and holler, "Bring on the troops, to hell with the troops." Captain Lyda was commanding officer of the troops. When he arrived at the scene with his soldiers he "told the crowd to move back repeatedly." In response to that "they whooped, jeered and called us scab lovers and paid gunmen," said, "Here comes the boy scouts, wooden soldiers." The troops undertook to push the crowd back so that the mules and wagons could move forward. Some of the men walking with the wagon were kicked and the mules were struck with sticks. At that time Hogan came up and said to Captain Lyda, "We will take charge of the situation." The captain ordered him to stand back. Hogan replied "that he had grown to the ground, and if we wanted him to move back we would have to saw him off." The captain said, "I finally drew my gun and put it into Hogan's stomach and told him to move back. Until that time I had not been able to move him." The sheriff was hit with a stick and deputy Robbins was hit on the head by a brick.

The foregoing is a brief summary of the evidence offered in behalf of the State. The defendants offered the testimony of more than twenty-five witnesses contradicting the evidence of the State and tending in every way to exculpate the defendants.

From the judgments pronounced the defendants appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

A. Hall Johnston and Thomas A. Jones for defendants.

BROGDEN, J. A voluminous record and a mass of conflicting testimony present two questions of law:

1. Was there sufficient evidence of a riot as defined by law to be submitted to the jury?

2. If so, was there sufficient evidence to be submitted to the jury that the appealing defendants aided and abetted therein?

The offense of riot has been considered by this Court in three cases, to wit: *S. v. Stalcup,* 23 N. C., 30; *Spruill v. Life Ins. Co.,* 46 N. C., 126; *S. v. Hughes,* 72 N. C., 25. In the *Stalcup case* a riot was defined "to be a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against all who shall oppose them, and afterwards putting the design into execution, in a terrific and violent manner, whether the object in question be lawful or otherwise. An indictment for a riot, always avers that the defendants unlawfully assembled. And this averment must (we think) be proved on the trial, as well as the subsequent riotous acts of the defendants, before they can be convicted of a riot." In other words, the offense is composed of three necessary and constituent elements, to wit: (a) unlawful assembly; (b) intent to mutually assist against lawful authority; (c) acts of violence.

A perusal of the evidence discloses plainly and unequivocably the essential ingredients of riot, and hence this phase of the case will not be debated.

The second question of law involves aiding and abetting. Mere presence, even with the intention of assisting in the commission of a crime, cannot be said to have incited, encouraged, or aided the perpetrator thereof, unless the intention to assist was in some way communicated to him; but if one does something that will incite, encourage, or assist the actual perpetration of a crime, this is sufficient to constitute aiding and abetting. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Dail,* 191 N. C., 234, 131 S. E., 574; *S. v. Tyndall,* 192 N. C., 559, 135 S. E., 451; *S. v. Baldwin,* 193 N. C., 566, 137 S. E., 590.

In order to apply the well settled principles of law it is necessary to recur briefly to the facts with reference to the participation of each of the appealing defendants in the riot.

Alfred Hoffman: This defendant was a recognized mouthpiece of the employees of the mill. He made several speeches to the workmen, and apparently they were depending upon his counsel and advice. The evidence for the State tended to show that at a meeting about three weeks before the date of the riot this defendant, in a public utterance, had said, "Don't let any one move into the Clinchfield mill village. Watch Rutherford County and South Carolina cars especially." There was further testimony from the State to the effect that at the same meeting over which the defendant Hoffman was presiding, he said: "If anybody gives out anything, they will take a long ride and won't come back." Hoffman testified as a witness in his own behalf that one Herling, a newspaper reporter was making some sort of a speech and that he (Hoffman) sent for the defendant Hogan, "and I told him to go down there and make that damn fellow keep his mouth shut, or something to that effect; I don't know just exactly what I said, but my effort was to get him quiet; he was speaking when I got there."

This testimony from the defendant tends to corroborate other evidence offered by the State to the effect that Hoffman was regarded as a leader by the workmen.

The sheriff testified that during the riot Hoffman made two or three trips with his car, stopping at a point near the scene of the disturbance, each time bringing a load of people armed with sticks. "When they got out of his car they would go down in the crowd with their sticks."

Another witness for the State testified: "Those folks Hoffman brought there, when they got out of his car, they walked into the crowd and took hand or part in the crowd, hollering, yelling, and cursing like the rest were doing at that time. . . . There was not a thing between Hoffman and the crowd to keep him from seeing what was going on there. . . . I would say, practically all of them in the crowd I saw Hoffman bring up there had sticks."

Hogan: The State offered evidence that Hogan went down to the Marion Mill and requested a man named Bryson who was on the picket line "to get the gang of fighters and go to Clinchfield." Hogan was present in the crowd that blocked Highway No. 10. He went from group to group talking to various persons at the time the tumult was in progress. When the troops arrived he declined to move so that the troops could pass until the captain of the military company drew his pistol. Hogan and Hoffman were closely associated in leadership of the workmen. Hoffman lived at Hogan's house and Hogan "was in charge of the relief and supervised the giving of requisition slips to the strikers." Hoffman testified: "I have made quite a few speeches around here as an officer of the organization. I depended on Hogan."

Lewis: The sheriff testified: "Del Lewis was right in the crowd helping to block the highway, kept us from getting back in the house with this stuff through the street. . . . He made all the racket he could."

Deputy Sheriff Hendley testified that Lewis beat upon the truck of the milkman who was trying to pass through the crowd. Lewis also "barked" at the officers. The sheriff said: "Lewis is a big barker."

Fowler: This defendant had an open knife in his hand and was arrested by the sheriff.

The foregoing excerpts from the evidence offered by the State warranted the trial judge in submitting the cause to the jury. The defendants, each for himself, denied any and all participation in the riot and offered testimony of many witnesses tending to show that they were present as peacemakers and not as stirrers-up of strife; and furthermore, that the whole tumult resulted from acts of violence committed by the officers upon women who were in the crowd, and that this conduct created the tumultuous scene disclosed by the evidence. However, the evidence in its totality produces a clear-cut issue of fact and under our system of law issues of fact must be determined by a jury.

Exception was taken to the introduction of the declaration of Hoffman at a meeting some three weeks before 30 August, 1928, to the effect that cars coming from Rutherford should be watched, and that if anybody told anything "they would take a long ride." Hoffman denied the making of any such declaration. There is no suggestion that the other defendants approved the declaration. This evidence would certainly be competent against Hoffman in connection with his conduct at the time of the riot in bringing various parties of men to the scene, most of whom were armed with sticks.

No error.

M. E. GRUBER ET AL. v. E. W. EWBANKS, TRUSTEE, ET AL.

(Filed 20 August, 1930.)

1. **Judgments F c—Defendant may not move for judgment on counterclaim, after final judgment, pending motion for judgment on injunction bond.**

   Where the plaintiff brings suit to enjoin the defendant from foreclosing upon a mortgage or deed of trust, and the defendant sets up as a counterclaim the notes secured by the mortgage, and the temporary order is continued to the final hearing upon the plaintiff's filing bond, and upon the trial of the action the defendant's motion as of nonsuit is allowed and the judgment affirmed on appeal, defendant's motion for judgment on the counterclaim, made for the first time after the final judgment, and while the action was pending only for the purpose of ascertaining the damages which the defendant had sustained by reason of the issuance of the restraining orders, is properly refused, the defendant by moving for judgment as of nonsuit and by failing at that time to move for judgment on his counterclaim having waived his right, if any, to such judgment, his motion as of nonsuit operating in effect as a voluntary nonsuit on the counterclaim.

2. **Injunctions H b—Recovery may not be had on injunction bond for items of damage not set out in bill of particulars.**

   Where an injunction restraining the defendant from selling certain land under foreclosure proceedings has been continued to the final hearing upon the plaintiff's filing bond, and at the hearing the action is dismissed, upon the defendant's motion for judgment for damages sustained by reason of the issuance of the restraining orders, the defendant having filed a bill of particulars by order of court setting out the items of damages claimed by him: *Held*, the defendant is confined to the items set out in his bill of particulars and may not recover as a part of his damages the rental value of the lands when he has failed to include such rental value in his bill of particulars as an item of damage claimed by him.

3. **Injunctions H a—Measure of damages recoverable against injunction bond.**

   Where a temporary order restraining the defendant from selling certain land under foreclosure proceedings has been continued to the final hearing upon the plaintiff filing bond as required by C. S., 854, and the injunction is finally dissolved, the measure of damages recoverable on the injunction bond is the loss sustained by the defendant by reason of the issuance of the restraining orders not exceeding the penal sum of the bond, which is ordinarily the depreciation, if any, in the value of the property from the date of the issuance of the injunction to the date of its dissolution, but if the value of the property at the date of the issuance of the injunction is insufficient to pay the amount of the debt secured by the mortgage, and there has been no depreciation in the value of the property, the measure of damages is the amount of interest on the debt accrued during the time the injunction is in force and not paid from the proceeds of the sale or otherwise. C. S., 854.

APPEAL by both plaintiffs and defendants from *Schenck, J.,* 7 December, 1929. From HENDERSON. Reversed and remanded.

This action was begun on 29 February, 1928. On the allegations of the complaint, plaintiffs prayed judgment that defendants be enjoined from selling the land described therein under the power of sale contained in a deed of trust executed by the plaintiff, M. E. Gruber, to the defendant, E. W. Ewbanks, trustee. This deed of trust was executed by the plaintiff to secure the payment of certain notes now held by the defendant, Lucille L. Seigling, executrix of R. C. Seigling, deceased. The consideration for said notes was the balance of the purchase price for said land, which was sold and conveyed by R. C. Seigling to the plaintiff, M. E. Gruber. Plaintiffs also prayed for judgment that the transaction resulting in the said conveyance be rescinded; that they recover of the defendant, Lucille L. Seigling, executrix, the amounts paid on the purchase price for said land and that the said notes be canceled and delivered to the plaintiffs.

Orders restraining the sale of the said land, issued on motion of the plaintiffs, were continued to the final hearing. Bonds were executed by the plaintiffs and their sureties, and filed as required by the judge in accordance with the provisions of C. S., 854.

Defendants in their answer denied the material allegations of the complaint. In further defense of plaintiffs' action, defendants alleged certain facts upon which they contended that plaintiffs are estopped from maintaining this action. They prayed judgment that the restraining orders issued in the action be dissolved; that they recover of the plaintiffs the sum of $100,000, the amount of the notes described in the complaint, with accrued interest, and that they have such other and further relief as the court should find that they are entitled to.

The action was tried at November Term, 1928, of the Superior Court of Henderson County. At the close of the evidence for plaintiffs, on motion of defendants, the action was dismissed by judgment as of nonsuit. C. S., 567. Defendants did not move at the trial for judgment on the notes, or for any other affirmative relief. Plaintiffs' appeal from the judgment was heard at the Spring Term, 1929, of the Supreme Court. The judgment was affirmed, 197 N. C., 280, 148 S. E., 246.

After the judgment of the Supreme Court had been certified to the Superior Court of Henderson County and after notice to plaintiffs, defendants moved for judgment (1) that they recover of the plaintiffs the sum of $100,000, the amount of the notes described in the complaint, with accrued interest, less the sum of $50,000, realized from the sale of the land described in the deed of trust, under the power of sale contained therein, which had been applied as a credit on said notes; and (2) that they recover of the plaintiffs and the sureties on the injunction bonds filed in the action, the damages which they had sustained by reason of the issuance of the restraining orders, which had been dissolved by the final judgment in the action.

Upon the hearing of these motions, the motion for judgment on the notes was denied. Defendants excepted to the denial by the court of their motion, and on their appeal to the Supreme Court assign such denial as error.

Prior to the hearing of the motion for judgment for the damages resulting from the issuance of the restraining orders, plaintiffs moved that defendants be required to file a bill of particulars, setting forth in detail each and all of the items of damages claimed by defendants. This motion was allowed, and in obedience to the order of the court, defendants filed a bill of particulars in which they set out in detail the several items of damages claimed by them. None of these items was for the rental value of the land from the date of the issuance of the first restraining order to the date of the final judgment.

At the hearing of defendants' motion, the court found that the reasonable rental value of the land described in the complaint, during the time defendants were restrained and enjoined from selling the same under the power of sale in the deed of trust, was $2,000; and that defendants had expended the sum of $36.90 in readvertising the land for sale, after the final judgment by which the restraining orders were dissolved. The court was of opinion, and so held, that defendants were not entitled to recover as damages other items set out in the bill of particulars. These items were the interest on the notes which accrued while defendants were enjoined from selling the land, and the amount paid out by defendants on account of witnesses who had attended the trial, and who were nonresidents of this State.

From judgment that defendants recover of the plaintiffs and their sureties the sum of $2,036.90, as damages resulting from the issuance of the restraining orders, both plaintiffs and their sureties, and defendants appealed to the Supreme Court.

Arledge & Taylor for plaintiffs and their sureties.
Buist & Buist and Ewbank, Whitmire & Weeks for defendants.

CONNOR, J. There was no error in the denial of defendants' motion for judgment on the notes described in the complaint. This motion was made for the first time after the action had been dismissed by final judgment, and after said judgment had been affirmed on plaintiff's appeal, by this Court. The action was not pending, at the time the motion was made in the Superior Court of Henderson County, except for the purpose of ascertaining the damages which defendants had sustained by reason of the issuance of the restraining orders, and the continuance of said orders to the final hearing. C. S., 855; *Well Co. v. Ice Co.,* 125 N. C., 80, 34 S. E., 198. Even if it be conceded that the allegations in the further defense of defendants' answer, are sufficient to constitute a counterclaim, upon which defendants would have been entitled to judgment at the trial of the action, when defendants, at the close of the evidence for the plaintiffs, moved for judgment dismissing the action as of nonsuit, C. S., 567, and failed at that time to move for judgment on the notes, or for other affirmative relief, they waived their right, if any, to such judgment, and in effect submitted to a voluntary nonsuit on their counterclaim. It was too late, after the action had been dismissed on their motion, to move at a subsequent term of the court, for judgment on their alleged counterclaim, or cross-action. After the judgment dissolving the restraining orders and dismissing the action had been rendered, defendants sold the land under the power of sale in the deed of trust. This was a recognition by defendants that the action was no longer pending for the purpose of affording relief to either plaintiffs or defendants upon any cause of action alleged either in the complaint or in the answer.

There is error in the judgment that defendants recover of plaintiffs and the sureties on their injunction bonds the rental value of the land described in the complaint, for the period during which defendants were enjoined and restrained from selling said land under the power of sale in the deed of trust. Defendants did not include such rental value as an item of the damages claimed by them, in their bill of particulars. It was error, therefore, for the court to hear and consider evidence offered by defendants over the objections of plaintiffs, as to such rental value. The court, in its discretion *(Townsend v. Williams,* 117 N. C., 330, 23 S. E., 461) had allowed plaintiffs' motion that defendants be required to file a bill of particulars. C. S., 534. When in obedience to the order of the court, defendants had filed their bill of particulars, they should have been confined, at the hearing, to the items of damage set out therein. It has been so held by this Court with respect to evidence offered by the State at the trial of a criminal action, where upon motion of the defendant and in obedience to the order of the court, the solicitor for the State had filed a bill of particulars, prior to the trial. *S. v. Wadford,* 194 N. C., 336, 139 S. E., 608. The rationale of this holding is applicable to evidence offered at the trial of a civil action, where on motion of one of the parties, the other party has filed a bill of particulars, in obedience to an order of the court. *Wiggins v. Guthrie,* 101 N. C., 661, 7 S. E., 761.

There was no error in the holding of the court that defendants are not entitled to recover, as damages resulting from the issuance and continuance of the injunction bonds, the item of interest, or the amount expended by defendants in procuring the attendance at the trial of nonresident witnesses. Neither of these items as set out in the bill of particulars can be included in the damages sustained by defendants by reason of the restraining orders or injunctions. C. S., 854.

Whereas, in the instant case, a creditor whose debt is secured by a mortgage or deed of trust, was restrained and enjoined, by orders issued in an action pending in the Superior Court, from exercising the power of sale contained in the mortgage or deed of trust, and the debtor was required in accordance with the provisions of the statute, C. S., 854, to file an undertaking or bond, to the effect that the debtor and his sureties, would pay to the creditor such damages, not exceeding the penal sum of the undertaking or bond, as the creditor should sustain by reason of the injunction, if the injunction was finally dissolved by the court, the measure of the damages which are recoverable by the creditor upon the dissolution of the injunction, is ordinarily the depreciation, if any, in the value of the property conveyed by the mortgage or deed of trust, as security for the debt, from the date of the issuance of the injunction to the date of its dissolution. The only interest which the creditor has in the property is its preservation as security for his debt, undiminished in value. It is this interest only which the debtor, who procures an order restraining the creditor from enforcing his security by the sale of the property, is required to protect by a bond or undertaking. If, notwithstanding the injunction, the creditor collects his debt, interest and costs, by the sale of the property, after the dissolution of the injunction or otherwise, he sustains no damages by reason of the injunction. If the property depreciates in value during the time the injunction is in force, and the creditor for that reason fails to collect his debt, interest and costs, the amount of such depreciation is ordinarily the measure of his damages.

If the value of the property at the date of the issuance of the injunction was not sufficient to pay the debt and interest, then accrued, the interest on the debt which has accrued while the injunction was in force, may be a proper item of damages for which the bond is liable. The creditor is entitled to the same security at the date of the dissolution of the injunction that he had at the date of its issuance—no more, and no less. If by reason of the issuance of the injunction he has lost the interest which has thereafter accrued, this loss may justly be included in the damages, recoverable on the bond.

The author of the article entitled "Injunctions," 32 Corpus Juris, at page 470, says that "it has been held that the loss in value of the property during the time the injunction was in operation, not exceeding the penalty of the bond, and the interest thereon from the time of the institution of the suit, is the proper measure of damages." Where there has been no depreciation in the value of the property, but such value both at the date of the issuance of the injunction and at the date of its dissolution, was insufficient to pay the debt and interest accrued at the date of the issuance of the injunction, the creditor has manifestly sustained damage in the loss of interest which accrued after the injunction was issued and while it was in force. Hence in the instant case, if it shall be found that the property was sufficient in value at the date of the issuance of the restraining orders to pay the notes secured by the deed of trust, and all interest thereon to the date of the final judgment, but was not sufficient, because of depreciation in value to pay said notes and interest, at the date of the final judgment, the amount of such depreciation is the measure of damages recoverable on the bonds, subject, of course, to the limitation of liability by reason of the penal sums of said bonds. If the property was not sufficient, at the date of the issuance of the restraining orders, to pay said notes and interest, and there has been no depreciation in the value of the property, then, the measure of damages is the amount of interest accrued during the time the restraining orders were in force, and not paid from the proceeds of the sale of the property or otherwise.

The full measure of damages recoverable on the bond dated 19 June, 1928, is not presented on this record. This bond was filed by the plaintiffs, in obedience to the order of the court, as a condition precedent to the continuance of the temporary restraining order to the final hearing. The penal sum of the bond is $7,500. It is conditioned for the payment by plaintiffs to defendants of such sum and interest thereon as may be finally adjudged to be due to defendants by plaintiffs on the notes described in the complaint. The bond was required as "additional security" for the debt. It is therefore distinguishable from the statutory bonds required by C. S., 854.

The judgment is reversed, and the action is remanded to the Superior Court of Henderson County for a further hearing of defendants' motion for judgment on the bonds filed by plaintiffs in this action. The court, in the exercise of its discretion, and after due notice to plaintiffs, may permit the defendants to amend their bill of particulars, so as to include therein claims for damages to be ascertained in accordance with this opinion.

Reversed and remanded.

T. M. MARSH, EXECUTOR OF ESKER CANTER, v. DURHAM LIFE INSURANCE COMPANY.

(Filed 20 August, 1930.)

Insurance K a—Knowledge of agent of physical condition of applicant is imputed to insurer.

Knowledge of the agent writing a policy of life insurance of the physical condition of the applicant is imputed to the insurer and the insurer may not avoid the policy upon the ground of false representations in regard thereto.

CIVIL ACTION, before *Sink, Special Judge,* at January Special Term, 1930, of SURRY.

The plaintiff instituted an action for the recovery of $770, which he alleged was due to the estate of his intestate by virtue of a policy of life insurance issued by the defendant.

The following issues were submitted to the jury:

1. "Did the insured falsely and fraudulently represent that he was in good health and had not been afflicted as alleged in the answer?"

2. "Did the defendant, with knowledge of insured's condition and such affliction issue and deliver the policy sued on?"

3. "What amount, if any, is defendant indebted to plaintiff?"

The jury answered the first issue "No," the second issue "Yes," and the third issue "$770, with interest."

The defendant offered evidence that plaintiff's intestate had undergone an operation in which one of his kidneys had been removed several years prior to the application for the policy of insurance sued on. The application stated that plaintiff's intestate had never been attended by a physician. The plaintiff, however, offered testimony to the effect that the agent of defendant who took the application, knew of the physical condition of plaintiff's intestate at the time the application was signed. The agent testified that he talked with the superintendent about writing the policy because he had heard that the health of the insured was not good and that the superintendent had instructed him to write the policy if he knew of no physical defects.

From judgment for plaintiff defendant appealed.

Folger & Folger for plaintiff.
E. C. Bivens for defendant.

PER CURIAM. The knowledge of an insurance agent, who procures an application for insurance, that at the time the applicant is in ill health, is imputed to the company, and such knowledge will prevent the company from avoiding the contract on the ground of false warranty. *Short v. Insurance Co.,* 194 N. C., 649, 140 S. E., 302; *Insurance Co. v.*

Grady, 185 N. C., 348, 117 S. E., 289. Therefore, evidence as to the knowledge of the agent writing the application, as to the physical condition of applicant was competent. The pertinent principle of law was thus declared in *Follette v. Accident Asso.,* 107 N. C., 240, 12 S. E., 370: "Actual knowledge of the plaintiff's defective hearing on the part of the agent was constructive notice of it to his principal, and, hence, the latter is deemed to have waived the objection that the deafness of the former was a bodily infirmity, notwithstanding the fact that it was provided in the policy that the agents of the company should have no power to waive its conditions."

Hence the answer of the jury to the second issue entitles the plaintiff to recover.

No error.

J. L. HAMME v. R. B. LINEBERGER.

(Filed 20 August, 1930.)

Attorney and Client D a—Attorney fully discharging all duties he is employed to perform is entitled to recover fee therefor.

Where an attorney is employed to institute an action, and the action has been instituted and successfully prosecuted, and the attorney has fully discharged all duties he was employed to perform, he is entitled to recover his fee therefor.

CIVIL ACTION, before *Harding, J.,* at December Civil Term, 1929, of GASTON.

J. L. Hamme for plaintiff.
E. R. Warren for defendant.

PER CURIAM. It is admitted that the plaintiff, an attorney at law, was employed by the defendant to institute an action for damages to property caused by the diversion and contamination of water. It is further admitted that the action was brought and the trial judge finds as a fact that the defendant agreed to pay plaintiff for his services a sum of money equal to one-third of the recovery. It is further found as a fact that the defendant recovered $6,000.

The said judgment was apparently entered by consent.

The defendant resists payment upon the ground that he has not collected the judgment, because he was required to sign an easement, and his wife will not join in such conveyance.

Upon the record, as presented, the plaintiff has fully discharged all duties that he was employed to perform and is therefore entitled to recover.

Affirmed.

J. P. CRISP v. KITCHIN LUMBER COMPANY.

(Filed 20 August, 1930.)

Master and Servant C b—Where failure to furnish tool is not shown to be cause of injury and injury could not be foreseen, master is not liable.

An employer is not liable in damages to his employee for unanticipated accidents or for failure to furnish an implement when it is purely speculative as to whether the injury would have occurred had it been furnished.

CIVIL ACTION, before *Moore, J.,* at January Term, 1930, of GRAHAM. At the conclusion of plaintiff's evidence there was judgment of nonsuit.

Morphew & Morphew and Moody & Moody for plaintiff.
R. L. Phillips for defendant.

PER CURIAM. In substance the case is this: The plaintiff and other workmen were engaged in removing trees, logs, stumps and rocks from the right of way of a proposed lumber road. The foreman directed the plaintiff to assist in rolling a large chestnut log down the hill. There was a limb under the log, which, according to the evidence, projected about two feet beyond the log. When the log began to roll the limb was thereby released and flew up and hit plaintiff on the hip, inflicting injury. There was nothing to indicate to the foreman that the limb was likely to cause injury.

The evidence leaves upon us the impression that the injury was the result of a mishap which sometimes creeps into the day's work without fault or negligence on the part of anybody. For such, the law creates no liability.

The plaintiff insists that a "peavey" was a tool approved and in general use for moving logs, and that if such an instrument had been furnished he would not have been injured, but a "peavey" would not have prevented the limb from flying up upon being released from the log. This contention, therefore, is sheer speculation, based upon the theory that the plaintiff would have been at the end of the "peavey" handle and out of reach of the flying limb. He might have been so situated at the time or might not, depending upon the progress of the work.

Reviewing the entire record, we are of the opinion that the judgment of nonsuit was properly entered.

Affirmed.

MARY E. LONG ET AL. v. CITY OF RANDLEMAN.

(Filed 20 August, 1930.)

Highways A d—Statutory remedy against Highway Commission for taking of lands is exclusive.

The remedy afforded by statute to the owner of lands for damages for the taking of his property for State highways is exclusive, and a motion as of nonsuit in an action therefor against a city which had agreed to save the Highway Commission harmless on claims for compensation within the city limits is properly allowed. C. S., 3846(bb), 3846(ff).

CIVIL ACTION for damage to property, before *MacRae, Special Judge,* at October Special Term, 1929, of RANDOLPH.

There was a judgment of nonsuit, from which plaintiff appealed.

Moser & Burns and A. C. Davis for plaintiff.
Brittain & Brittain and H. M. Robins for defendant.

PER CURIAM. The State Highway Commission constructed Highway No. 70 through the city of Randleman. In so doing the road was built across certain land of plaintiff within the corporate limits of said city.

The law imposes upon the Highway Commission the duty to lay out and build State highways, and in order to enable it to properly perform its function it is authorized to condemn land. C. S., 3846(bb). The defendant entered into an agreement with the Highway Commission in accordance with C. S., 3846(ff) to "save the State Highway Commission harmless from any claim for damages arising from the construction of said work through the said city, and including claims for right of way, change of grade line, and interference with public service structures." The State Highway Commission was not a party to the action.

Ample remedy is afforded to owners of land whose property has been taken for highway purposes and this remedy provided by statute is exclusive. *Latham v. State Highway Commission,* 191 N. C., 141, 131 S. E., 385; *McKinney v. Highway Commission,* 192 N. C., 670, 135 S. E., 772; *Greenville v. Highway Commission,* 196 N. C., 226, 145 S. E., 31. In the *McKinney case, supra,* this Court pointing out the remedy, said: "This remedy is equally available to the owner of land and the State Highway Commission."

Affirmed.